TITLE 327 WATER POLLUTION CONTROL BOARD

#99-58(WPCB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from October 1, 2001 through October 30, 2001 for submission of comments on IDEM's draft rule language. IDEM received comments from the following parties:

American Consulting, Incorporated (ACI)
American Electric Power, also commenting on behalf of Indiana-Kentucky Electric Corporation (AEP)
Benss, George, citizen, Beverly Shores, Indiana (GB)
Bernacchi's Oak Valley Greenhouses, (BOVG)
Bethlehem Steel Corporation represented by Mark E. Shere, Attorney, (Beth)
Botts, Lee, citizen, Gary, Indiana, also on behalf of the Lake Michigan Federation (LB)
Breitinger, Walt, citizen, Valparaiso, Indiana (WB)
Buckeye Pipe Line Company (BPL)
Chary, Lin Koutz, citizen, Gary, Indiana (LKC)
Collicoat, Elizabeth, citizen, Beverly Shores, Indiana (EC)
Fleming, Lynnette, citizen, Portage, Indiana (LF)
Friel, Jean, citizen, Gary, Indiana (JF)
Friend, Ellen, citizen, Beverly Shores, Indiana (EF)
Gary, City of (Gary)
George Lake Wetlands Restoration Committee (GLWRC)
Goetz, John, citizen, Gary, Indiana (JG)
Gonzalez, Donna, citizen, Griffith, Indiana (DG)
Grand Cal Task Force, (GCTF)
Huffe, John, citizen, Long Beach, Indiana (JH)
Indiana Builders Association (IBA)
Indiana Coal Council, Incorporated (Coal)
Indiana Department of Natural Resources (IDNR)
Indiana Farm Bureau, Incorporated (IFB)
Indiana Lakes Management Society (ILMS)
Indiana Manufacturers Association (IMA)
Indiana Steel Environmental Group (ISEG)
Indianapolis Power & Light Company represented by Mark E. Shere, Attorney, (IPL)
Jones, Bruce, citizen, Portage, Indiana (BJ)
Lagoin, Barbara, citizen, Beverly Shores, Indiana, (BL)
Lagoin, Taree, citizen, Beverly Shores, Indiana (TL)
Light, Randi, citizen, Ogden Dunes, Indiana (RL)
Lucas, Martin R., Attorney, North Judson, Indiana (MRL)
McCloskey, Terrence and Elizabeth, citizens, LaPorte Indiana (TEM)
Mitch, Charles, citizen, Columbus, Indiana (CM)
Newton County represented by Sommer & Barnard, Attorneys at Law, (NCo)

NiSource Corporate Services (NiS)
O'Brien, Sandy, citizen, Hobart, Indiana (SO)
Read, Herb and Charlotte, citizens, Chesterton, Indiana (HCR)
Republic Services, Incorporated, representing the Indiana Chapter of the National Solid Waste Management Association (RSI)
Rooney, Henry, citizen, Gary, Indiana (HR)
Rooney, Marilyn, citizen, Gary, Indiana (MR)
Save the Dunes Conservation Fund (SDCF)
Save the Dunes Council (SDC)
Serynet, Thomas, citizen, Gary, Indiana (TS)
Smolka, George E., citizen, Griffith, Indiana (Smol)
Sweeney, Jim, citizen, Schererville, Indiana (JS)
The Nature Conservancy, Indiana Chapter (TNC)
United States Department of Agriculture, Natural Resources Conservation Service (NRCS)
Waste Management (WM)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: The Water Pollution Control Board is strongly urged to adopt the wetland rules that have been drafted by the IDEM as much needed protection of Indiana resources. (LB, GB, EC, LKC, EF, JF, LF, DG, JG, JH, BJ, BL, RL, TL, HR, MR, JS, TS, IDNR, MRL, CM, WB, TEM, HCR, SDC, SDCF, SO, GCTF, GLWRC, BOVG, TNC)

Response: IDEM agrees that the rules are appropriate for adoption and provide necessary wetland protection and appreciates the support for the wetland rulemaking.

Comment: The Water Pollution Control Board is strongly urged to withdraw the wetland rules that have been drafted by the IDEM and in their stead adopt the rules that have been written by the Coalition on Wetland Issues. (IMA)

Response: On December 12, 2001, the Water Pollution Control Board voted to hold hearing on a citizen petition put forth by the Coalition on Wetland Issues. This petition contained the "rules" mentioned in this comment. IDEM strongly supports the rejection of this citizen petition. This petition advocates a "rule" that fails to protect many wetlands, establishes wetland water quality standards that would most likely not be approved by the U.S. Environmental Protection Agency, and creates procedures for water quality certification that fail to properly implement Section 401 of the Clean Water Act.

Comment: The Water Pollution Control Board is strongly urged to withdraw the wetland rules that have been drafted by the IDEM and wait for the Indiana General Assembly to establish a comprehensive wetlands policy. (IBA)

Response: The General Assembly's Environmental Quality Service Council (EQSC) has examined IDEM's wetland rulemaking and wetland policy twice in the past two years. In both instances the EQSC did not direct the agency to halt its rulemaking. IDEM has made numerous significant changes to the draft rules as a result of recommendations from the EQSC.

Comment: The Water Pollution Control Board is strongly urged to withdraw the ill-conceived and unlawful wetland rules that have been drafted by the IDEM and develop a new draft that narrows the scope by confirming that existing water quality standards apply to all federal navigable waters and establishes simple procedures for public notice of 401 certifications for such waters. (Beth, IPL, ISEG, RSI, WM)

Response: The draft rules have been developed in full compliance with all applicable state laws. Further, IDEM has provided additional public comment periods to fully assure all persons have opportunity to review and comment on the draft rules. IDEM rejects the suggestion that this rulemaking limit its scope to only waters deemed "federal navigable", as this would be in clear violation of the statutory definition of waters of the state. The General Assembly made clear that IDEM's authority to regulate waters is broad and is in no way constrained or restricted by any federal definition of waters. The draft rules provide clear procedures that are understandable to the public and will be implemented by IDEM.

Comment: IDNR has reviewed the wetland rules drafted by IDEM and considered them with respect to resource needs in Indiana and in accordance with the National Environmental Policy Act of 1969. Various divisions within IDNR attended the public meetings and participated on the rules workgroups throughout this rulemaking conducted by IDEM. The rulemaking process has been lengthy but thorough, and IDNR's questions and concerns have been addressed and answered through the workgroup process. The draft rules are comprehensive, detailed, and include alternatives sequencing, mitigation requirements, and mitigation monitoring criteria. Currently Indiana lacks much in the way of essential requirements for protecting wetlands. Avoidance of wetland impacts must be the priority, and compensatory mitigation must be adequate and complete when impacts are permitted. IDNR believes the wetland rules drafted by IDEM will protect the most unique wetlands in the state and require mitigation for other wetland impacts. (IDNR, SDC, TEM)

Response: IDEM agrees that the rules are appropriate for adoption and provide necessary wetland protection and appreciates the support for the wetland rulemaking.

Comment: IDEM is to be congratulated for the job it has done in preparing rules that offer substantial protections for wetlands while allowing for economic growth. IDEM has also done an excellent job in reaching out and responding to all interested parties during the rule development process. It is now time to move forward as quickly as possible to the Water Pollution Control Board for preliminary adoption. (GCTF)

Response: IDEM agrees that the rules are appropriate for adoption and provide necessary wetland protection and appreciates the support for the wetland rulemaking.

Comment: The regulation of wetlands has essentially two (2) parts that include water quality and land use. There is no doubt of IDEM's proficiency in the area of water quality, but significant doubt exists as to the agency's role and proficiency in land use regulation. (IMA)

Response: IDEM's role in land use regulation is not at issue. The wetlands rulemaking concerns the agency's role in regulating wetlands, which are waters of the state.

Comment: This rulemaking began as part of IDEM's compliance with federal requirements for triennial review of state water quality regulations. Unfortunately, the rulemaking has grown far beyond the federal requirements, to the point that it would impose what may be the most expensive set of controls ever proposed by IDEM in the absence of a federal mandate. The wetland water quality standards are not needed because existing water quality standards are strongly protective. The rulemaking would, in essence, make IDEM the state's leading land use agency, with broad discretion over hundreds of thousands of acres of private land. This rulemaking is being proposed at exactly the wrong time for the state which faces a serious budget shortfall, for industry which is spiraling into recession, and for the country which faces far more serious challenges that require attention and resources. (Beth, IPL, ISEG)

Response: The draft rules are intended to clarify the procedures for making determinations under the federal Section 401 water quality certification requirements. The

proposed wetlands water quality standard is a further clarification of the existing criteria which applies now to wetlands. The draft rules do not result in an increase in costs relative to existing rules and requirements.

Comment: The Indiana Department of Natural Resources (IDNR) already regulates the federally controlled wetlands that are the subject of the triennial review process by effectively precluding development in flood ways adjacent to water bodies and has regulations that protect the function of broader flood plains and flood hazard area that extend to other, low lying land. If IDEM desires any further action beyond these IDNR protections and 327 IAC 2 concerning water quality standards, then IDEM could issue a single sentence of new regulation or a policy statement to clarify and confirm that these existing water quality standards apply to all waters of the United States including all wetlands subject to federal control. Throughout the rulemaking process, IDEM has not identified why the existing requirements are not adequate for federally controlled wetlands. (Beth)

Response: Regulations that restrict development in floodways in no way address potential impacts to water quality, which is the regulatory responsibility of IDEM. Contrary to this comment, the IDNR regulations do not preclude all development in floodways. As stated previously, IDEM does not agree with the suggestion that this rulemaking limit its scope to only waters deemed "federal navigable" or labeled as "waters of the United States", as this would be in clear violation of the statutory definition of waters of the state. The General Assembly made clear that the Water Pollution Control Board and IDEM's authority to regulate waters is broad and is in no way constrained or restricted by any federal definition of waters. The commentor is mistaken in the belief that IDEM's authority to regulate wetlands is somehow confined by federal definitions or federal permit programs. Congress clearly set forth rights and responsibilities for states to protect water quality, which can and does differ from federal protections. IDEM has made plain the need for wetland-specific standards: current water quality standards contain designated uses and criteria that are inappropriate for many, if not all, wetlands. IDEM has been directed by USEPA to remedy this by the creation of new water quality standards for wetlands. The need for written regulatory procedures for IDEM's Section 401 program has been expressed by numerous applicants and citizens, who desire a clear, predictable process.

Comment: The General Assembly has never defined that a wetland, isolated or not, is a water of the state. Only the General Assembly may direct policy direction taken by a state agency. The omission by the state legislature to even mention wetlands in the statute that defines the authority of the Water Pollution Control Board strongly indicates that the legislature did not intend for the WPCB to created sweeping wetland regulations. (Beth, IBA, IPL, ISEG)

Response: IC 13-18-3-1, which grants the WPCB the authority to adopt rules for the control and prevention of pollution in waters of Indiana, also fails to mention "stream", "river", "lake", or any other specific type of water body. This does not mean that the General Assembly did not intend for the WPCB to create regulations for those waters. Also, the statutory definition of "waters", IC 13-11-2-265, does not define the term by use of a list of types of water bodies, but merely provides that the "accumulations of water" within, flowing through, or bordering upon Indiana are waters of the state. Clearly the General Assembly intended the WPCB to have the authority to regulate all accumulations of water in the state, absent the few statutory exemptions provided in IC 13-11-2-265(b). "Wetlands" are not included in the list of waters exempt from the definition of "waters," and therefore are waters of the state.

Comment: The WPCB has statutory authority to adopt rules prohibiting pollution on waters of Indiana but does not have statutory authority over the main activities that IDEM is seeking to regulate with the wetland draft rules. These activities include placement of clean fill on land, contouring and grading of land, removal of vegetation, or essentially any other form of construction. The normal conduct of these activities on private land does not create a nuisance or make any waters harmful; therefore, they are not polluting and may not be regulated by the WPCB. (Beth, IBA, IPL)

Response: The rules are targeted at regulating, in part, the placement of fill in wetlands, which are not "land", but are waters of the state.

Comment: IC 13-14-8-4 requires IDEM's rulemaking to consider technical feasibility and economic reasonableness. IDEM's responses to date in these matters have been insufficient. As a matter of law, it is not sufficient to state that the technical infeasibility of achieving certain requirements of rules is no excuse for not achieving compliance. IDEM's response that there is not an expectation that the new rules have a significant economic impact is unjustified. The new rules are over sixty (60) pages in length and very complex. The new rules will affect numerous landowners and developers who have not previously had to contend with anything similar but will now need to incur the expense of consultation just to understand the rules. IC 13-14-8-4 also requires IDEM's rules to consider past, present, and probable future uses of the area including the character of uses of surrounding areas; additionally, zoning classifications must be considered. The new rules seem to be predicated on the presumption that a wetland use is always superior to any other potential property use; this is an invalid assumption. Finally, there is no federal or state law to authorize IDEM to require mitigation as a condition of any state permit. Section 404 of the Clean Water Act is the program that requires mitigation and the Corps of Engineers already adequately handles that program. (NCo)

Response: The draft rules will not have a new major economic impact or will in some way subject landowners and developers to a new, unfamiliar program. The draft rules are merely mirroring into state rule the process that IDEM has been utilizing previously to implement the federal/state wetlands program. It can be argued that the rules should reduce costs by clarifying existing requirements and lessening the need for consulting services to individuals subject to the rule.

Comment: The Water Pollution Control Board is urged to adopt wetland regulations that protect high quality wetlands while streamlining the permitting process so that economic development can proceed and, specifically, so that an expedited permit process is available for utilities. (NiS)

Response: The draft rules address the concerns expressed by this commentor. First, the rules provide protection for all wetlands, regardless of whether they are isolated or adjacent. The rules establish a clear baseline that all waters that meet the criteria set forth in the draft rules are wetlands and are thereby regulated by IDEM. This insures that a consistent, predictable framework is created. Second, the draft rules establish a tier system, by which wetlands that are rare, sensitive to disturbance, or possess unique aquatic communities are a given greater level of protection. Lastly, the rule allows IDEM to establish general permits and approve Corps of Engineers general permits for activities that have minimal impacts to water quality both singly and cumulatively. These general permits already cover many utility projects and IDEM will develop comparable general permits for the surface water modification permit program upon final adoption of these rules.

Comment: The economic impact of the draft wetland rules is staggering, possibly on the order of tens of millions if not over a billion dollars. Numerous economic development projects across the state would never begin due to these rules and chances of the state's economic recovery would be severely dampened. In light of the current fiscal status of Indiana, state government should be promoting economic growth not sweeping land use regulation that could severely cripple the housing industry especially at a time when Indiana must have thirty thousand (30,000) to thirty-five thousand (35,000) new housing starts a year over the next ten (10) years to accommodate average population growth and support the economic vitality of Indiana. The Water Pollution Control Board is strongly urged to require an independent economic analysis of these draft wetland rules according to IC 13-14-9-5. (Beth, IBA, IPL, NCo, WM)

Response: IDEM does not expect these rules to create any adverse economic impacts based on the scope and effect of the draft rules. Section 401 of the Clean Water Act already requires persons to obtain a water quality certification, and the current water quality standards of 327 IAC 2 already apply to wetlands. These rules therefore impose few changes in the current regulatory program and the rules governing water quality and wetlands. Additionally, IDEM's requirements mirror many of the requirements set forth by the Corps of Engineers and the Department of Natural Resources, which improves consistency and reduces costs to applicants. The rules further reduce cost and uncertainty for applicants by standardizing many key components of the process, such as mitigation requirements, application documentation, and other related reports. Lastly, IDEM has taken steps outside of the rulemaking process to streamline administrative requirements. For example, IDEM has granted water quality certification for a variety of general permits, such as some nationwide permits and a regional general permit, that are administered by the Corps of Engineers. Taken as a whole, this results in no significant economic impacts to the regulated community. The commentors have provided no factual or meaningful information to support their position that this rule would impose significant, or even minor, adverse economic impacts over and above those resulting from the current program.

Comment: The draft wetland rules fail to consider how many unwitting violators there will be since there is nothing in the rules to exempt small players, such as landowners having docks, sea walls, and the like, who will not be able to do any work on those structures without causing a discharge to water. Rules with such wide scope should at least be publicized more widely before they become law and should require a careful analysis of economic impact and the ease with which regulated entities can comply. The rules should not be adopted unless and until IDEM has a specific plan in place to educate and assist the public with working through the morass of new regulations. (NCo)

Response: IDEM already has a comprehensive plan to educate the general public on the scope and effect of these rules, part of which has been in place since the inception of this rulemaking. First, IDEM created a large website with information on the water quality certification program, this rulemaking, and many other wetland-related topics and issues. The entire scope of the rulemaking, from meeting agenda to rule drafts, have been posted and maintained on this site. Additionally, all information on agency policies that have changed since the U.S. Supreme Court decision on isolated waters have been posted on this site. IDEM continually updates this site with relevant information on these rules for the public to understand, information on how to submit certain documents required by these rules, and information on the status of Indiana's wetland resources. Second, IDEM, with funding from an Environmental Protection Agency grant, has a completely new outreach program, complete with brochures,

informational videos, and a regulatory handbook that helps persons navigate not only IDEM's regulatory process, but that of the Corps of Engineers and the Department of Natural Resources. Once these rules are adopted, IDEM will meet with customer groups to explain the rules, provide education about the value of Indiana's wetlands, and guide persons through the regulatory process so as to minimize confusion, reduce delays, and avoid potential violations.

Comment: IDEM has estimated that this rulemaking will apply to eight hundred thousand (800,000) acres of land. IDEM will not be able to process the number of applications that will be generated through this rulemaking based on current staffing and with the state budget shortfall resulting in a state hiring freeze. (Beth, WM)

Response: IDEM currently has adequate staffing and fiscal resources to efficiently implement the draft rules as proposed. This rulemaking, as has been stated previously, will not result in a higher influx of applications because the draft rules apply to activities and aquatic resources that are currently and have been regulated in the same manner as that which is proposed in these rules. Further, IDEM has improved the efficiency of the program by creation of a Regional General Permit with the Corps of Engineers that significantly reduces both review time and paperwork for truly minimal projects, such as bridge maintenance and utility line crossings. In 2001, IDEM received over six hundred (600) applications for certification, but more than a third of those applications fell under the Regional General Permit. Additionally, the commentor is incorrect in referring to this rulemaking applying to eight hundred thousand (800,000) acres of "land". This rulemaking would apply to approximately eight hundred thousand (800,000) acres of wetlands and to other waters of the state.

Comment: Although IDEM has stated in prior comment responses that it has been administering the Section 401 program for almost twenty (20) years and anticipates no problems administering the new wetland program, the truth is that IDEM has not considered how it is going to handle the administrative burdens of the new wetland program. If IDEM really believed it will have no problems conducting the wetland program, why does it allow itself a year to process a permit when IDEM asserts that in the past most water quality certifications have been processed in sixty (60) days? In fact, IDEM currently handles few of its permit programs efficiently which is why the state legislature has had to impose strict time limits on IDEM permitting with IC 13-15-4-1. IDEM, itself, seems to anticipate not handling the new wetland program efficiently. Given the program's extreme complexity, the outcome will be that IDEM delays will result in greater expense, delay, and frustration for permit applicants. (NCo)

Response: The commentor does not provide any factual information to support the contention concerning increase resource demands on IDEM. IDEM has a good track record for timely actions on 401 water quality certifications and will continue to process applications in a timely manner under the draft rules. IDEM anticipates that having these wetland rules in state regulation will improve the applications submitted by clarifying rule requirements and allowing for a more timely process in some instances.

Comment: A sixty (60) day extension of the draft rule comment period is requested because few small local governments have commented on the rules. The potential impact of the new rules has only recently become clear. The fact is that these draft rules are by no means limited to wetlands but also impact existing zoning classifications and community comprehensive planning which, therefore, usurps local authority. (NCo)

Response: IDEM does not believe there is a need to further extend this comment period. This rulemaking has been extensively promoted by IDEM through numerous public workgroup meetings, multiple staff seminars taken to various locales throughout the state, the two month

long public hearing before the WPCB, and the half year long process of special hearings by the state's Environmental Quality Service Council in addition to the prior draft rules comment period which lasted from December 1, 1999 to February 14, 2000. Small and local entities have been represented with the submission of written comments and presentation of oral comments before the WPCB by county government, Indiana Association of Soil and Water Conservation Districts, Indiana Association of Cities and Towns, Indiana Chamber of Commerce, county surveyors, as well as by individual citizens and family farmers. This wetland rulemaking has been underway since April 1999 and conducted in a thorough and slow paced manner with ample time given for public input and comment. All interested persons have had opportunity to comment on the draft rules and will continue to have opportunities as the rulemaking proceeds.

Comment: IDEM is to be thanked for opening this additional comment period on the draft wetland rules and for having made changes to the draft rules based on previous comments submitted in the original draft rule comment period. (AEP, NiS)

Response: IDEM is committed to public involvement in our rulemaking process. The additional comment period has been provided because the draft rules changed considerably as a result of the comments received during the original draft rules comment period and due to the SWANCC decision.

Comment: IDEM is thanked for this additional comment period, and it is hoped that this time IDEM will respond to "comments made in review of the draft 401 Rule as the IDEM did not revise the rules to reflect or respond to the City of Gary's concerns." IDEM's refusal to make changes in the rules as drafted, specifically IDEM's continued refusal to include an evaluation component in the designation of Tier II Wetlands or to remove the requirement for "up-front mitigation before impact", will make expansion at the Gary Chicago airport extremely difficult if not impossible." The application of this rule to the isolated wetlands that are no longer deemed to be under the jurisdiction of the Corps of Engineers also is opposed since IDEM has refused to change the rules concerning the 401 program. (Gary)

Response: IDEM responded to four hundred and two (402) specific comments or questions regarding the draft rules during the second notice comment period before the June/July 2000 WPCB hearing. IDEM made changes to the rules in response to over one hundred (100) comments and provided clarification for numerous others where the commentor was unsure if a provision existed in the current rule. IDEM disagreed with other comments that sought to add provisions that are clearly outside of IDEM's authority to require or implement or created inappropriate exemptions or loopholes. The draft wetland rules have undergone considerable change since their original form. Further, the rulemaking has been the subject of hearing, public workgroup meetings, and special hearings by the state's Environmental Quality Service Council. As well, the rules were modified in response to the federal ruling in the SWANCC case. All comments submitted during official comment periods have been answered. In dealing with a subject upon which there are diametrically opposed opinions, no single answer will satisfy both sides of the situation. IDEM believes that the agency has been responsive to comments and concerns. IDEM believes the draft rules are the worthy balance that allows economic development to occur while protecting the state's wetland resources. With respect to the City of Gary's concerns about the impacts of the Tier II classification on the airport, IDEM continues to work with Gary to further clarify how the draft wetland rules would be applied to the area surrounding this site. IDEM does not believe that rule changes are needed to address Gary's concerns.

Comment: "In public statements supporting the proposed [sic: draft] Rule, certain IDEM officials have stated that certain provisions of the proposed [sic: draft] Rule would, if taken literally, be very unreasonable but that that should not affect the Rule's adoption since that IDEM employee would not enforce the Rule as stated. This manner of selective and subjective enforcement based on the whim of an individual IDEM employee would not only expose the IDEM to meritorious litigation forcing literal implementation but it would also violate the Due Process principles of the U.S. and Indiana Constitutions because such determinations by their very nature are clearly arbitrary and capricious. In addition, it would also violate the important principle of Indiana law that environmental policy is established by the legislature or the Water Pollution Control Board, not individual IDEM employees, and are put in writing so that everyone knows what it is and can comply with it." (Gary)

Response: In the past, a common grievance from the regulated community was that applications for 401 water quality certifications were reviewed in an arbitrary and capricious manner because there was no rule to standardize the requirements of the certification process. With the adoption of these rules, IDEM intends to implement the rules as promulgated. It should also be noted that all agency final actions are appealable. Thus, although IDEM strives to be consistent in its implementation and enforcement of rules, the system of checks and balances that includes the administrative appeal process as well as the use of the Indiana courts ensures this.

Comment: IDEM has not made a compelling case that the new rules are necessary. The new wetland rules are filled with undefined terms and vague, discretionary IDEM powers but fail to give regulated entities adequate notice of what is expected. IDEM has repeatedly stated that the new rules do not create new regulatory authorities but merely clarify and create procedures for implementing existing regulatory programs. If this is true that authority to do all of the things covered by the new rules already exists, then why is a vast and complicated new rulemaking necessary at all? Why do the new rules allow IDEM a year to issue a water quality certification when IDEM states they formerly have taken sixty (60) days to process? Furthermore, IDEM has not fully explained the need for an entirely new type of permit, the surface water modification permit, and the class of waters these new permits are intended to regulate. What purpose is served by the new rules that is not already served by existing regulatory programs administered under Section 404 of the Clean Water Act? (NCo)

Response: The draft rules create a specific regulatory framework, with carefully defined terms, detailed procedures for review of permits, and accountability for both IDEM and the applicant. The lack of administrative rules to implement the 401 water quality certification program has been a consistent complaint relative to this program for years. IDEM has also consistently explained our interest in bridging the gap in federal regulations left by the U.S. Supreme Court Decision in January 2001. The state rules are not duplicative of any federal regulation and should provide clarity and consistency in implementing the federal program and the state law. Lastly, IDEM has modified the draft rules by striking the reference to the year timeframe for review, which IDEM is legally entitled to under the Clean Water Act.

Comment: The draft rules promoted by IDEM are not worthy of adoption because they are redundant of the federal wetland program. (Beth, IMA)

Response: Although many provisions of the rules are similar to those followed by the Corps of Engineers under Section 404, the state rules are not merely a duplication of existing regulation. The scope of authority of the two (2) agencies is different, and that fact is reflected in the rules. For example, one (1) of the factors considered by the Corps but not IDEM is whether a project will affect navigation. As another example, IDEM will determine whether a proposed

project will violate state water quality standards. The Corps of Engineers is not required to make this determination but must defer to IDEM's determination. IDEM has administered a Section 401 water quality certification program for close to two (2) decades prior to the development of these rules. The federal Clean Water Act specifically gives powers to the states to administer this program with recognition of individual states' rights to establish water quality standards specific to the water resources within a given state. This is in addition to the federal Section 404 program administered by the Corps of Engineers. The draft rules for Indiana wetlands do not change the basic way IDEM currently regulates wetlands under Section 401 of the Clean Water Act. They provide clarity for certification applicants as to IDEM's review process, guidance on steps needed to comply with standards, and defined procedures for review and public involvement.

Comment: The draft wetland rules need to be reviewed together with the changes being made to 327 IAC 15 to eliminate conflicts and overlaps between the rules and the Corps of Engineers permit program. (RSI)

Response: IDEM has worked closely with the U.S. Army Corps of Engineers throughout the history of our implementation of Section 401 of the Clean Water Act. The draft rules in no way conflict or overlap with the Corps of Engineers regulatory process. The draft rules for Indiana wetlands do not change the basic way IDEM currently regulates wetlands under Section 401 of the Clean Water Act. They provide clarity for certification applicants as to IDEM's review process, guidance on steps needed to comply with standards, and defined procedures for review and public involvement. These rules will reduce project delays, as applicants will be able to submit completed applications for certification and know fully the questions that must be answered to demonstrate compliance with Indiana law.

Comment: The idea that the Indiana draft wetland rules are a duplication of federal laws that are enforced by the Corp of Engineers is erroneous. A personal situation of a property owner fighting for thirteen (13) years to preserve a large wetland on the owner's property from destruction has shown that the protection available through the Corp of Engineers changes every time the Corps is taken to court. The recent decision to remove isolated wetlands from the Corps jurisdiction is an example of just such action. Indiana needs to have its own laws to protect its wetlands. (BOVG)

Response: IDEM believes the draft rules are not duplicative of current federal laws. IDEM is specifically charged with the protection and regulation of all waters within the state of Indiana, using appropriate water quality standards as the underpinning of its programs. The federal programs currently have significant gaps in their ability to adequately regulate or protect all waters.

Comment: Many small projects with limited or temporary impacts to wetlands are currently regulated under the Corp of Engineer's Nationwide Permit Program or Regional General Permit Program. The rules drafted by IDEM seem to add an additional layer of protection for Indiana wetlands, and, although this additional protection could have some value, IDEM is encouraged to avoid unnecessary duplication that may cause expenditure of effort and expense for both the permittees and the regulatory agency. It is suggested that IDEM certify all of the 404 Nationwide Permits thereby reducing the additional burden that these draft wetland rules will impose on the regulated community. (AEP, NiS, WM)

Response: It is inappropriate for IDEM to issue certifications for all current Section 404 nationwide permits because some of the permits as written would authorize activities that would violate Indiana water quality standards and cause significant wetland destruction. While this course of action may marginally reduce administrative burden, it would have clear and

measurable adverse impacts not only on wetlands but also on water quality within Indiana's streams, rivers, and lakes. For this reason, IDEM will not approve all Section 404 nationwide permits.

Comment: The Buckeye Pipe Line Company hereby requests that a permit by rule authorization be included in the applicable wetland regulations for pipeline inspection and repair work conducted within wetlands. Pipeline companies need special access to wetlands that overlay pipelines in order to inspect and maintain the pipelines without extensive permitting and associated lengthy permitting requirements. A new federal rule that is relatively complex was published in the December 1, 2000 Federal Register and is entitled, "Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators With 500 or More miles of Pipeline)" and is generally known as the High Consequence Area rule (HCA). HCA requires extensive short and long term planning to meet the requirements of the rule. Immediate (generally accepted as within five (5) days) repair is required upon confirmation of metal loss having occurred in a pipeline. Under a permit by rule process, a pipeline company would immediately begin required inspections and repairs and do the following: (1) notify the appropriate agency of work locations; (2) access wetlands according to standard, preapproved procedures, such as using swamp mats, that protect wetlands; (3) maintain the original surface elevation; (4) dewater excavation while using standard sedimentation and erosion control techniques; and (5) separate the topsoil, maintain the original plants if possible or by using natural revegetation, and return the topsoil to the original location. A GIS format of a pipeline company's pipeline centerline as submitted to the National Pipeline Inventory Mapping System could be provided to IDEM for its convenience. (BPL)

Response: IDEM's draft rules set forth the option for IDEM to create general permits. IDEM contemplates the creation of a general permit that addresses the maintenance of utility lines, as well as utility line installation. For utility line projects requiring a Section 401 water quality certification, this activity is covered by Nationwide Permit 12-Utility Lines. IDEM has granted water quality certification for this nationwide permit meaning that projects such as utility line installation do not need separate individual water quality certifications. IDEM continues to work with both the Corps of Engineers and the Department of Natural Resources on other reasonable methods of administrative streamlining. The commentor's suggested language will be considered as general permits are developed.

Comment: It is recommended that the draft wetland rules include categorical waivers for the 401 water quality certification and the surface water modification permit for any project covered by the Corp of Engineers Nationwide Permit or Regional General Permit that does not affect a Tier II wetland, an Outstanding National Resource Water, or an Outstanding State Resource Water. (NiS)

Response: It is inappropriate for IDEM to issue certifications for all current Section 404 nationwide permits because some of the permits as written would authorize activities that would violate Indiana water quality standards and cause significant wetland destruction. While this course of action may marginally reduce administrative burden, it would have clear and measurable adverse impacts not only on wetlands but also on water quality within Indiana's streams, rivers, and lakes. For this reason, IDEM will not approve all Section 404 nationwide permits.

Comment: Indiana has lost nearly ninety percent (90%) of its original wetlands to farming and development. Wetlands are incredible resources for wildlife habitat, ground water recharge, polluted runoff filtration, recreational activities, and flood control. Flooding killed

fifteen (15) and cost three hundred seventy million (370,000,000) dollars in Indiana from 1989 to 1998 according to the Army Corps of Engineers. Protecting wetlands is an effective and efficient way to reduce the devastation that flooding causes. (GB, EC, LKC, EF, JF, LF, DG, JG, JH, BJ, BL, RL, TL, HR, MR, JS, TS, WB, SDC, SO, BOVG)

Response: Wetlands provide significant benefits to society due to their ability to retain floodwaters and release those waters slowly after large rainfall events. This is but one of many important benefits wetlands provide to both society and the environment.

Comment: To date, Indiana has lost approximately eighty-five percent (85%) of its pre-settlement wetlands through draining and filling for other uses. Protection of our state's remaining wetlands is vital to the people and natural resources of Indiana. The rules as drafted by IDEM will provide protection to Indiana's wetlands and to isolated wetlands in instances where federal authority has been lessened through the Supreme Court decision of early 2001 concerning the "Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers" (SWANCC decision). (IDNR, GCTF)

Response: The draft rules provide a consistent, continuous level of protection and regulatory review for activities that would affect all waters, including isolated wetlands. Further, these rules are similar to regulations developed by other states, such as Tennessee and Virginia.

Comment: Historically in Indiana, it has been lake resident citizens who have taken the responsibility of restoring a degraded lake even though the lake residents had little to do with the primary cause of the lake's decline. Lakes are the receivers of all that is sloughed off the watershed where they are located. Sediment and nutrient loading from land use activities in a watershed is a primary cause of lake degradation in Indiana. It is now commonly accepted in the scientific communities that wetlands are beneficial for lakes and watersheds as they help remove sediments and nutrients in the runoff water flowing through them. Removing isolated wetlands from formal regulation, as is the expectation under the SWANCC decision, will result in the complete burden of maintaining lake water quality to be upon lake residents and the state's resources. A non-lakeshore landowner in a lake's watershed who fills a wetland will get a short term benefit in property development, but it is the lake residents, lake users, and consumers of public water supplies who will incur financial hardship from the negative impact to the water quality. Many of the lakes in Indiana are in rural areas where the lake homes have a value two (2), three (3), and sometimes many more times the value of most of the non-lake homes. Lakes provide valuable real estate in Indiana which in turn provides tax dollars to the state. For all these reasons, the wetland rules containing protection for isolated wetlands through the surface water modification permit requirements are strongly recommended for adoption. (ILMS, GCTF)

Response: The direct effect of the loss of both isolated and non-isolated wetlands on water quality in nearby waterbodies, such as lakes, is well established. Increased loading of sediment, nutrients, and other pollutants to lakes decreases both their biological and recreational value. Efforts by both government and private organizations to improve the quality of lakes will be significantly undermined unless the state continues to protect wetlands in all areas and of all types. The draft rules provide a vital part of this equation.

Comment: The draft wetland rules will cause a lot of land in Indiana to be unsuitable for development thereby raising the price of land that is suitable. The outcome of these draft rules is that Indiana would no longer be the twelfth most affordable housing state in the country. (IBA)

Response: Currently, it is estimated that only three and four-tenths percent (3.4%) of the total surface area of the state is covered by wetlands. For a point of reference, Indiana is over twenty-three million (23,000,000) acres in size. Further, at least twelve percent (12%) of

Indiana's wetlands are either on protected federal or state land, or in managed conservation areas. Lastly, many wetlands exist in regulated floodways where the development of buildings is significantly restricted. Overall, vast portions of the state remain available for development; wetlands simply are not the only remaining place for home construction in Indiana. There is no evidence provided by the commentor that supports the conclusion that the draft rules would, in any tangible or measurable way, effect land prices or an individual's ability to construct affordable housing.

Comment: The surface water modification permit program newly included in the draft wetland rules is expansive way beyond the original purpose of the rule. According to the IDEM web site, this new program would extend to at least eight hundred thousand (800,000) acres of land counting only areas with a minimum size of one (1) to three (3) acres. Areas of acreage less than this minimum size are the areas likely to be most important to small property owners. This new program extends far beyond traditional wetlands such as shallow or deep marshes. IDEM should recognize that the former federal wetland definition was found by the U.S. Supreme Court in the SWANCC decision to be overreaching of federal authority, and Indiana should not seek to replace federal overreaching with new, state, overreaching regulations. (Beth, IBA)

Response: IDEM estimates that the surface water modification permit program will cover roughly three hundred eleven thousand (311,000) acres of isolated wetlands and waters, which is not restricted to areas of one (1) to three (3) acres in size. Secondly and contrary to the commentors' assertion, shallow and deep marshes are only two (2) of the many different types of waters traditionally considered wetlands. Lastly, the Supreme Court did not invalidate the federal definition of wetlands. Correctly stated, what the Supreme Court did was to rule that certain "waters", whose only connection to interstate commerce was through the so-called "Migratory Bird Rule", were not sufficiently connected to interstate commerce to be under federal jurisdiction. The ruling in no way changed the federal (or state) definition of wetlands. The Supreme Court stated clearly that isolated waters that are wholly contained within a given state's borders are most appropriately regulated by the state, not the federal government.

Comment: A former federal definition of wetlands that has been struck down by the SWANCC decision is being used by IDEM inappropriately and without authorization to create the sweeping, land use, surface water modification permit program. The former definition of wetland applied to private land ranging from dry to soggy and made no distinction based on the actual presence or absence of water. The definition also made no distinction between broad areas of significant habitat and isolated areas located entirely on the private land of a single owner. The wetland rules drafted by IDEM also seek to incorporate an one hundred fifty (150) page manual from the Army Corps of Engineers on the application of this former federal wetland definition. The Water Pollution Control Board does not have legal authority to impose this former federal definition in new state regulations. (Beth, NCo)

Response: A great deal of confusion has been generated by the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) ("*SWANCC*"). The Court held in a 5-4 decision that the Corps of Engineers had exceeded its authority when it asserted jurisdiction over intrastate waters (gravel pits) based solely on the presence of migratory bird habitat. The Court did not strike down the Corps' regulation establishing the definition of waters of the United States (waters over which the Corps would assert jurisdiction) at 33 CFR § 328.3(a)(3) or the definition of wetland (33 CFR § 328.3(b)). The Court also did not strike down the federal manual used by the federal government to delineate wetlands. In fact, the Supreme Court has upheld the Corps' regulation of wetlands as

waters of the United States (*United States v. Riverside Bayview Homes*, 474 US 121, 106 S.Ct. 455 (1985)) and other courts have upheld the federal wetland delineation manual. The SWANCC decision only applied to the federal government's jurisdiction; it did not apply to state governments' jurisdiction. In fact, the Supreme Court reaffirmed states' long-standing rights to regulate isolated, intrastate waters. IDEM's authority is based on state law. More specifically, IDEM is authorized under Title 13 of the Indiana Code to implement statutes passed by the Indiana General Assembly and rules adopted by the Water Pollution Control Board (board). The board is authorized under Title 13 to adopt rules protecting waters of the state and aquatic life. "Waters" of the state include both public and private accumulations of water. Therefore IDEM is authorized to implement whatever rules the Board may adopt to protect waters of the state, including isolated wetlands.

Comment: The wetland rules as drafted by IDEM are critically important for the watershed of Lake Michigan where past loss of wetlands has already profoundly reduced wildlife habitat and increased flooding and drainage problems. The National Wetland Inventory shows that about thirty percent (30%) of Indiana's surviving wetlands are the kind of isolated wetlands that could be protected by the rules as drafted. That percentage is even higher when considering isolated wetlands in the three (3) shoreline counties of Lake, Porter, and LaPorte and the part of Allen County that is in the Lake Erie watershed. Indiana has a special responsibility to protect the dune and swale wetland complexes in Lake county because this landscape is so rare that it is considered globally significant. Virtually all the dune and swale wetlands in Lake County are included in the nearly eight thousand (8,000) acres that can be considered isolated in this county (LB, SDC)

Response: Protection of wetlands, especially isolated wetlands in the Lake Michigan watershed, is exceptionally important. In many places throughout this watershed, wetlands and lake levels are intimately related, and many significant types of wetlands, such as globally rare dune and swale wetlands, are only found in this section of the state. Failure to adequately regulate wetlands, including isolated wetlands, will have measurable adverse impacts on water quality and biological integrity, as well as increase the incidence of localized flooding and exacerbate existing drainage problems.

Comment: Many grassroots individuals are currently involved trying to save the George Lake Wetlands, one hundred forty-eight (148) acres of marshes and open water wetlands, in Hammond, Indiana. Many of the individuals assumed wetland protection existed in Indiana until the campaign to save the habitat for migratory birds was underway and discovered otherwise about Indiana's protection of wetlands. It is particularly sad that the city of Hammond is exploiting its wetlands under a TIF development plan. The mayor of Hammond has refused concerned residents the right to participate in an Army Corps of Engineers public hearing regarding Hammond's request to fill the wetlands for an adult golf course and for intense recreational activities such as canoeing and sport fishing. The loss of bird habitat on the Hammond and Whiting Lake Michigan shoreline areas due to marina and casino developments has been enormous, and even more development is planned with the Horseshoe Casino management. Is Hammond's refusal to allow public participation currently allowed, and will it continue to be allowed under the conditions of the draft wetland rules? (GLWRC)

Response: The draft rules contain specific procedures for the public to voice comments on applications under review by IDEM. Public noticing of all applications is key to this public involvement process, as well as the procedures that detail how citizens can petition IDEM for a

public hearing or public meeting as another means of conveying comments to the agency. These rules in no way impinge on or affect the powers of local governments.

Comment: The IDEM currently administers the 401 water quality certification program, as authorized by the federal Clean Water Act, with no written procedures or policies. This approach lends itself to inconsistent, subjective implementation. Final adoption of the rules as presently drafted by IDEM will clarify the program and improve its effectiveness. (GB, EC, LKC, EF, JF, LF, DG, JG, JH, BJ, BL, RL, TL, HR, MR, JS, TS, WB, TEM, SDC, SO)

Response: The goals of improved program clarity and increased effectiveness have been the chief reasons for this rulemaking. The draft rules provide clarity for certification applicants as to IDEM's review process, guidance on steps needed to comply with standards, and defined procedures for review and public involvement. These rules will reduce project delays, as applicants will be able to submit completed applications for certification and know fully the questions that must be answered to demonstrate compliance with Indiana law.

Comment: The 401 water quality certification and surface water modification permit application processes also need to give review consideration to the following: (1) the location of an affected wetland being adjacent to or in the drainage path of an existing or proposed Confined Animal Feeding Operation as in that location a wetland will impede the flow of contaminating waste material into waters of the state; (2) zoological criteria for the determination of the quality of wetlands as they are proving to be last resort habitats for many aquatic organisms that are part of the natural and normal control mechanisms perpetuating and maintaining the health of agricultural, urban, and recreational lands; and (3) the location of natural wetlands adjacent to and interspersed between man made retention ponds where the natural wetland's utility is of greater importance by way of serving as a nursery for natural predators to help control the mosquitoes and other nuisance and health, hazard organisms that retention ponds, especially when first built, are not much capable to control. (Smol)

Response: The 401 water quality certification and surface water modification permit application processes are assessments of a project's potential impact on water quality. As a part of all reviews, IDEM considers such factors as the landscape position of a given wetland, the aquatic community present in the wetland, the relationship between the wetland and other anthropogenic features, and a myriad of others. The draft rules as written address the concerns of the commentor.

Comment: The wetland water quality standards at 327 IAC 2-1.8 address the fact of considerable importance that wetlands are biologically and chemically different from flowing waters or large lakes. (TEM)

Response: In 1990, USEPA published guidance directing all states to develop water quality standards that directly reflect the unique physical, chemical, and biological properties of wetlands, in recognition of the fact that these waters differ greatly from rivers, streams, and even lakes. The draft rules fulfill this goal established by USEPA.

Comment: The purpose of the wetland rules must be to protect water quality and existing uses as established on or after November 28, 1975. The focus must be on water, water quality, and hydrologic functions to assure protection of our water resources now and in the future. The presence or absence of plant species should not be the deciding factor to protect water quality. (SDC)

Response: Nothing in the draft rules contradicts IDEM's stated goals of the regulation of water quality and the protection of existing and designated uses of all waters. Plant species are used in these draft rules to distinguish wetland types, not to exclude areas from protection.

Comment: The definitions of 327 IAC 2-1.8 have parts that appear so vague as to be unworkable unless further meaning is provided. Without ascertainable standards, the rules may be held to be unconstitutionally vague. (RSI)

Response: All definitions in the draft rules have been written and revised to provide clarity. All technical terms have been defined, and, where possible, definitions are quoted verbatim from other statutes and rules.

Comment: The definitions for all Tier II wetland types in 327 IAC 2-1.8-2 should be more detailed by removing the words "generally" and "typically" and requiring that all the characteristics must be met qualify as the type wetland described. The list of indicator species should be more conservative because many of the indicator species listed in the definitions are found in many types of habitats including disturbed habitats. (NiS, RSI)

Response: IDEM has modified the definitions of all Tier II wetlands to clearly indicate that all characteristics listed must be present in order for a given wetland to be classified as Tier II. IDEM believes that the listed plants are considered to be highly conservative and indicative of the types of wetlands listed. IDEM worked extensively with numerous wetland professionals in both the public and private sectors to refine this list and insure that the appropriate plant species were included in this draft rule.

Comment: There is concern that the indicator plant species listed for wetland types in 327 IAC 2-1.8 may be used to exclude a particular wetland from Tier II status because the native plants found at a wetland site are not listed as an indicator plant in the rule. For example, pitcher's thistle is listed as an indicator despite the fact that Swink and Wilhelm refer to it as a shoreline plant. (HCR)

Response: IDEM worked extensively with numerous wetland professionals in both the public and private sectors to refine this list and insure that the appropriate plant species were included in this draft rule. IDEM is confident that the plant species lists are accurate and truly reflect all indicator species for Tier II wetlands. Pitcher's Thistle, or *Cirsium pitcheri*, is found in dunes along the Lake Michigan shoreline and in areas considered dune and swale wetlands; therefore its inclusion in the list is appropriate.

Comment: The Nature Conservancy is a science based organization guided by a plan entitled "Conservation by Design". The basis of this plan is the division of the United States into sixty-three (63) ecoregions with selected priority sites within each ecoregion that are representative of the ecoregion and show its global significance. Four (4) of these ecoregions converge in Indiana. The ecoregional plans for each of these four (4) areas are completed and have identified a number of wetlands; some of these identified wetlands are already in protective status, but many are not yet protected. A full spectrum of all types of wetlands is important to the health of our ecosystems, and The Nature Conservancy is particularly supportive of rules that protect special wetland communities, namely bogs and fens, that cannot be replicated. Fens are slightly more common in Indiana than bogs, but both are highly rare and equally important and deserving of special protection. Most Indiana bogs and fens are found in the Northern Lakes Natural Region of the state. Mitigation for these types of wetlands is virtually impossible. With the apparent changes in wetland protection following the SWANCC decision, Indiana is urged to ensure that bogs and fens are protected as the special wetlands that they are through the adoption of the wetland rules as drafted by IDEM. (TNC)

Response: The draft rules will insure that rare types of wetlands, such as bogs and fens, will have a level of protection that is commensurate with the extreme difficulty in replacing these wetlands through mitigation. Further, these rules address the wetland protection issues created by

the SWANCC decision, a Supreme Court case that constrained the federal government's ability to regulate certain isolated waters.

Comment: Some important types of high quality wetlands in Lake County should also be included as Tier II wetlands. These rare wetlands are the gently sloped dune ridge and wetland depression dune and swale type of landscape formed from the Griffith sand spit and include the areas of the Hoosier Prairie State Nature Preserve which is a nation Natural Landmark, Oak Ridge Prairie County Park, and other prime natural areas in Lake County that do fall into the Tier II category of the draft rules. The glacial geology of these rare areas is much older than the classic dune and swale close to Lake Michigan and has become acidified. Lake County Parks is not inclined to preserve this land; it needs state protection because they are truly irreplaceable. The indicator species for these rare areas could be: (1) colic root (*Aletris farinosa*); (2) meadow beauty (*Rhexia virginica*); (3) fringed gentian (*Gentiana crinita*); and (4) steeple bush (*Spirea tomentosa rosea*). There should be a floristic quality standard such as the Swink and Wilhelm floristic quality index or these and other high quality natural area wetlands are going to be classified as Tier I under the draft wetland rules. (SO)

Response: IDEM continues to evaluate the definition of dune and swale wetlands noted in the draft rules. IDEM is consulting with various experts to verify that the indicator plants listed are representative of the distinct types of dune and swale wetlands found in the north-western portion of the state. The plant species listed by the commentor appear to indigenous to both dune and swale wetlands as well as wet prairies.

Comment: The vagueness represented by "very slowly" in the definition of acid bog at 327 IAC 2-1.8-2(1)(B) could be interpreted many ways and does not allow proper determination of its applicability. (RSI)

Response: The meaning of the term "very slowly" is clear when read in context with the rest of the definition. This section of the rule reads as follows: "(B) The water regime is nonflowing or very slowly flowing.". IDEM asserts that the plain meaning of the term is sufficient for the purpose of the rule and requires no further clarification.

Comment: The vagueness represented by "mineral-laden" in the definition of circumneutral bog at 327 IAC 2-1.8-2(3)(B) could be interpreted many ways. Almost all ground water contains some minerals; at what point does it become mineral-laden? (RSI)

Response: IDEM has modified the referenced definition by removing the term "mineral-laden".

Comment: The vagueness in the definition of circumneutral bog at 327 IAC 2-1.8-2(3)(D) could be interpreted many ways and does not allow proper determination of its applicability. Do the substrates rise and fall? (RSI)

Response: IDEM has modified the referenced definition by removing the phrase "and may rise or fall with seasonal water level fluctuations".

Comment: The vagueness in the definition of cypress swamp at 327 IAC 2-1.8-2(6)(A)(iii) concerning major tributaries could be interpreted many ways and does not allow proper determination of its applicability. Which rivers are major tributaries? (RSI)

Response: IDEM has modified this comment to strike the term "major", as cypress swamps may be found on smaller streams, oxbows, and other types of tributaries.

Comment: The vagueness represented by "water chemistry is indistinct" in the definition of cypress swamp at 327 IAC 2-1.8-2(6)(C) could be interpreted many ways and does not allow proper determination of its applicability. (RSI)

Response: IDEM has modified the referenced definition by removing "water chemistry is indistinct" and replacing it with "water chemistry is circumneutral".

Comment: The vagueness in the definition of dune and swale at 327 IAC 2-1.8-2(8)(A)(i) could be interpreted many ways and does not allow proper determination of its applicability. How near do the noted wetlands have to be to Lake Michigan before they fall within the definition? (RSI)

Response: IDEM has modified this part of the definition by including specified eight (8) digit watershed codes.

Comment: The definition of dune and swale at 327 IAC 2-1.8-2(8) needs to state that fragments of a dune and swale or a dune and swale substantially modified by human activities do not fall into the Tier II dune and swale classification. (Gary)

Response: It would be inappropriate to exclude any of the more rare wetland Tier II types remaining from higher levels of protection even if they are degraded from their natural condition. Dune and swale wetland complexes in northwest Indiana, not just within the city limits of Gary, are globally rare and threatened resources. Even remnant dune and swale complexes provide important water quality functions and refuge for rare and endangered organisms. IDEM views all dune and swale complexes as important and, therefore, rejects the argument that exemptions should be made based on size, relative level of degradation, or impacts due to contamination. IDEM does recognize that some areas that may have historically been dune and swale may no longer meet this definition; these areas would not be regulated as Tier II dune and swale wetlands.

Comment: The indicator species listed in 327 IAC 2-1.8-2(8) for dune and swale are inadequate, and, as written, it is not clear if all the conditions in clauses (A) through (F) must be met to qualify as dune and swale habitat. There are valuable dune and swale located further inland from Lake Michigan that are not covered by the species listed in the draft rule. In addition, there are many factors that affect the chances of being able to locate each given species when surveying a wetland to determine whether it qualifies as dune and swale. (SDCF)

Response: IDEM continues to evaluate the definition of dune and swale wetlands noted in the draft rules. IDEM is consulting with various experts to verify that the indicator plants listed are representative of the distinct types of dune and swale wetlands found in the north-western portion of the state. IDEM has modified the definitions of all the Tier II wetlands to clearly indicate that all characteristics listed must be present in order for a given wetland to be classified as Tier II.

Comment: The draft wetland water quality standards rule does not have the intent to prevent any and all wetland impacts in some areas such as Tier II wetlands as much of the regulated community believes. However, the use of a single indicator plant species to identify Tier II wetlands may be overly restrictive. In order to avoid conflicts of interest, IDEM should confer with experts representing not for profit groups dedicated to the preservation of nature, such as The Nature Conservancy or the Save the Dunes Conservation Fund, on the conservation of the various types of Tier II wetlands to try to determine whether requiring a higher number of indicator species may serve the purpose of protecting those high quality wetlands deserving of protection. (GCTF)

Response: IDEM has already conferred with the IDNR and the U.S. Fish and Wildlife Service regarding plant indicator species and the need to require a higher number of species in order to have a given wetland qualify as a Tier II wetland. Additionally, IDEM has consulted with several of the states foremost botanists in this matter. The conclusion of all parties was that

the lists established by IDEM in the draft rules contain species which are most indicative of the wetland types defined as Tier II. Since these species are highly sensitive to disturbance, the presence of any one of these species would indicate that many others on the list are also present in a given wetland. Lastly, the presence of a given plant species does not, in and of itself, indicate that a given area is a Tier II wetland. All the listed physical characteristics must be present in order for a given area to be classified by IDEM as a Tier II wetland.

Comment: Development and redevelopment in the City of Gary would be brought to a stop if the Tier II classification of dune and swale is applied regardless of size, quality, functionality, or if only one (1) indicator species is present in the remnant dune and swale in Gary. Wetland specific criteria need to be developed for each category of wetland, including dune and swale, to qualify for Tier II inclusion. If the Tier II classification is retained in the wetland rules, then there needs to be an initial site-by-site quality evaluation of a potential Tier II wetland before designation. In the case of the master plan for the Gary Chicago Airport, impacts are avoided to high quality dune and swale wetlands, but the "asphalt (dune and swale) wetlands" directly in the path of the westward airport expansion are not worthy of protection. (Gary)

Response: Dune and swale wetland complexes in northwest Indiana, not just within the city limits of Gary, are global, rare, and threatened resources. Even remnant dune and swale complexes provide important water quality functions and refuge for rare and endangered organisms. IDEM views all dune and swale complexes as important and, therefore, rejects the argument that exemptions should be made based on size, relative level of degradation, or impacts due to contamination. The current Tier II wetland definitions provide all relevant "wetland specific criteria" needed. IDEM will evaluate all information pertaining to a given wetland prior to determining the appropriate tier designation. This evaluation would also include a site investigation.

Comment: The wetland rules as drafted contain no exception from designation of a wetland as Tier II if it meets the definition no matter what its state of disturbance. Tier II status places a significant regulatory burden on applicants. Tier II status should be determined by a peer review scientific process and take into account the quality of the wetland. A suggested way to do this is to eliminate the Tier II wetland as defined and designate the OSRWs and ONRWs as Tier II wetlands. At a minimum, the rules should include an appeal process by which an applicant could submit information documenting that the wetland no longer functions as a Tier II wetland and that it should be reclassified as a Tier I wetland. (ISEG, NiS, RSI)

Response: The criteria listed in the definitions for each type of Tier II wetland were developed through an extensive process of consultation with many experts within the public and private sectors. These definitions have been refined to insure that the criteria are clear for the purpose of making determinations. Including or excluding a given wetland based on it's quality adds a subjective element to the definition which would lead to potentially arbitrary decisions regarding tier classification. The term "quality" is not defined because of the subjective determination regarding the characteristics and methods that would be used to assess this transient state of a wetland. A separate appeals process is unneeded, as this process already exists as a part of the administrative review procedures IDEM must follow for all final agency decisions. IDEM would consider all information presented during a permit review regarding the potential classification of a given wetland: the rule in no way "establishes" the classes of wetlands without site by site review.

Comment: What is the intent and applicability represented by the definition of existing uses at 327 IAC 2-1.8-2(11)? (RSI)

Response: The definition is the same as that provided under the federal rules. The intent is to ensure that existing uses in waters of the state are given the full protection accorded them by current federal and state antidegradation standards.

Comment: What is meant by "minerotrophic" in the definition of fen at 327 IAC 2-1.8-2(12)(C)? (RSI)

Response: In Wetlands, the most widely distributed text on wetland science, Mitsch and Gosslink (1986) describe a wetland as *minerotrophic* when "inflowing water has a high specific conductivity resulting from the presence of dissolved cations. The peat is saturated with bases, and the pH, as a result, is close to neutral." This definition has been added to the rule.

Comment: The vagueness represented by "northern portion of the state" in the definition of muck flat at 327 IAC 2-1.8-2(19)(A) could be interpreted many ways and does not allow proper determination of its applicability. (RSI)

Response: IDEM has modified this section of the definition to read as follows: "Located within the glaciated portions of the northern half of Indiana.".

Comment: Does the muck flat itself float on the water surface according to the definition at 327 IAC 2-1.8-2(19)(C)? (RSI)

Response: IDEM has modified the referenced definition by removing the following: "May float on the water surface but".

Comment: The statutory definition of "waters of the state" referenced at 327 IAC 2-1.8-2(28) excludes private ponds from regulation though no definition of a private pond is provided. Inevitable confusion and potential abuse of the exclusion will result from having no definition of private pond. It is recommended that a definition be developed for a private pond that specifies a two (2) acre size limit and a requirement that the pond must be artificially constructed and not connected to waters of the state. (SDCF)

Response: IDEM appreciates the difficulty of working with the term "private pond." However, given that the exemption of "private ponds" from the definition of "waters" at IC 13-11-2-265(b) applies to most of Title 13 of the Indiana Code and all of IDEM's water rules, IDEM does not believe that providing a definition of the term in this particular rule is appropriate.

Comment: The word "pond" is not defined in statute and "private pond" is exempt from the definition of "waters of the state" meaning that a private pond cannot be regulated by IDEM. Private ponds were exempted principally to protect farmers and private landowners from burdensome regulations. As a private wetland is not different from a private pond, the same courtesy of relief from regulation should be extended where wetlands are concerned. (NCo)

Response: A private wetland is not the same as a private pond.

Comment: The statutory definition of "waters of the state" extends to traditional bodies of water such as lakes, rivers, and streams but does not extend to land that is dry or merely soggy without accumulated water being present. Also, the statutory definition makes an important distinction between public and private waters by specifically excluding private ponds from the definition. Case law found in Argyelan v. Haviland confirms this understanding of the definition of "waters of the state" by defining surface water that does not flow in defined channels as a common enemy. Therefore, the state does not have the authority to regulate wetlands if they are not located on waters of the state. (Beth, IBA, IPL, ISEG, WM)

Response: The statutory definition of "waters" of the state includes "accumulations of water, surface and underground, natural and artificial, public and private". There is nothing in the statute that restricts "waters" of the state to only lakes, rivers and streams. It is not clear what the commentors mean by saying the state does not have authority to regulate wetlands if they are not located on waters of the state. Wetlands, themselves, are waters of the state. The exclusion from the definition is for "private ponds" (provided they do not have a discharge that may cause water pollution). A fundamental principle of statutory interpretation is that exceptions are to be construed narrowly and the enumeration of certain things in a statute necessarily implies the exclusion of all others; i.e., when certain items are specified in a statute, then, by implication, other items not so specified are excluded. Since wetlands are not listed in the exclusion to the definition, they are included in the definition and are waters of the state. The *Argyelan* decision and the *Bulldog Battery* decision, mentioned below, have no bearing on these wetland rules. Both cases dealt with situations where one neighbor changed the elevation of its property; constructed buildings; paved part of the property; and installed downspouts that emptied near the adjacent neighbor's property. The cumulative effect of these actions led to flooding problems on the adjacent neighbor's property. The adjacent neighbors brought various actions against the landowners, including nuisance, criminal mischief, and trespass. The courts in both cases reaffirmed the common enemy doctrine, which essentially allows landowners to increase or divert surface runoff (such as rainfall or snow melt) from their property to the detriment of adjacent landowners (subject to limited exceptions). Regulating wetlands does not change the common enemy doctrine, nor does the common enemy doctrine, which is concerned with diffuse surface water flow, prohibit the regulation of wetlands.

Comment: The plain wording of Indiana statute is further confirmed by Indiana case law in the ruling of Bulldog Battery Corp. v. Pica Investments, 736 N.E,2d 333, 339 (Ind. Ct. App. 2000) which states that it is not unlawful for a landowner to improve his land in such a way as to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land. IDEM through these draft wetland rules is trying to regulate activities that are not polluting and therefore not under the authority of the Water Pollution Control Board. (Beth)

Response: While the state's authority includes the regulation of discharges of pollutants, it is not limited to that. The U.S. Supreme Court upheld states' rights to regulate water quantity under their water pollution control laws. In *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 1912-13 (S. Ct. 1994), the Court upheld the state's inclusion of a minimum stream flow requirement in its 401 water quality certification. The Court noted that it was appropriate to ensure compliance with the stream's designated uses and was also a proper application of state and federal antidegradation regulations. The Court rejected the petitioners' argument that the CWA only allowed regulation of water "quality" and not water "quantity." Finding that to be an artificial distinction, the Court noted that water quantity is closely related to water quality and that a sufficient lowering of the quantity in a body of water could destroy its designated uses. The Court further pointed out that the CWA itself recognized that reduced water quantity can constitute water pollution, as evidenced by the definition of "water pollution." The Court stated that this broad conception of pollution evinced Congress' concern to protect the physical and biological integrity of water and refuted petitioners' argument. (See 114 S.Ct. 1912-13; see also sections 101(a) and 502(19) of the CWA.) "Water pollution" is defined at IC 13-11-2-260 in part to mean "actual or threatened alteration of the physical, thermal, chemical, biological, bacteriological, or radioactive properties of any waters." This definition parallels the

federal definition of water pollution set forth in the CWA, and the rules adopted by the Board parallel the framework established in the CWA for protecting water quality. IDEM believes the Supreme Court's decision was well reasoned and reaffirms IDEM's determination that the state has authority to adopt these rules.

Comment: The intent of the term "designated" as used in 327 IAC 2-1.8-3 is not clear. The section's applicability is questionable as it goes well beyond the required characteristics of a wetland. Why are artificial wetlands such as those being used for wastewater treatment being exempted? (RSI)

Response: As used in the section, "designated" refers to designated uses, which are established pursuant to Indiana's requirement to maintain the state's water quality, which includes the maintenance of uses. "Artificial" or "constructed" wetlands built by man for the purpose of waste water treatment are specifically designed to treat wastes and should not be expected to meet the same standards and requirements as "natural" wetlands just as sewage treatment lagoons built for the treatment of sewage are not held to the same standards as are lakes.

Comment: The criteria in 327 IAC 2-1.8-4 for classifying a Tier II wetland address only habitat types but not the significant functions of wetlands such as ground water recharge, flood control, or nutrient filtration. There may be areas in critical need of these functions warranting greater status than Tier I for the wetlands that provide the services. It is recommended that addition to the draft rule be made to address the potential for the function of a wetland to justify higher ranking in the manner that the criteria for an Outstanding National Resource Water allow designation to consider exceptional ecological significance and other special environmental, recreation, or ecological attributes. (SDCF)

Response: The tier classification presented in this rule was the result of several years of discussion and research. The Tier II definition was designed, in part, to encompass irreplaceable wetland community types or provide protection where there is little or no evidence that mitigation can be successfully accomplished. It also recognizes wetland types that are rare or unique in the state. Many of the criteria listed in this comment would be difficult, if not impossible, to assess on a case-by-case basis. It would be unwise for IDEM to add these criteria to the rule as it would result in unclear regulation of the resource. Once the requirements for designating waters as Outstanding State Resource Waters, as required by SEA 431, are developed, individual wetlands that might meet these requirements but are not Tier II wetlands could be proposed for this designation and additional protection.

Comment: 327 IAC 2-1.8-4 refers to a process for designation of wetlands as Outstanding State Resource Water, but that process no longer exists in the current draft of the wetland rules. (GCTF)

Response: The general process for designating a water as an OSRW was set forth in SEA 431 in the 2000 session of the General Assembly. Once this process has been developed in more detail, the process will be added to this rule as well as other water rules so as to be consistent.

Comment: The strict compensatory mitigation requirements for Tier II wetlands, especially requirements for replacement with designated and existing uses equal to or higher than those of the impacted wetland and successful completion of mitigation in advance of creating any impact, are wise and necessary for the state's wetland rules to be meaningful. There may be room for compromise concerning Tier II wetland designation with regard to size. An area of very small size, meaning less than a quarter or a half an acre, may warrant reconsideration as a Tier II wetland if the viability of the area is impaired as a high quality ecosystem due entirely to the

small size. IDEM should confer with experts representing not for profit groups dedicated to the preservation of nature, such as The Nature Conservancy or the Save the Dunes Conservation Fund, on the conservation of the various types of Tier II wetlands to try to determine whether size consideration would affect protection of those high quality wetlands that deserve protection. (GCTF)

Response: Tier II wetlands are estimated to comprise ten thousand (10,000) to fifteen thousand (15,000) acres of wetlands, or less than two percent (2%) of the total acreage of wetlands. Extensive consultation with both the Department of Natural Resources, Division of Nature Preserves and the U.S. Fish and Wildlife Service has shown that even relatively small Tier II wetlands can provide vital habitat for both state and federally listed species. Additionally, since these areas are so rare, the few that remain are often small fragments of the size indicated by the commentor. The consensus among the agencies is that size is an arbitrary distinction when evaluating the "importance" of the listed Tier II wetlands. Consequently, it doesn't make sense for IDEM to modify the draft rules to allow for reclassification of a wetland determined to be a Tier II type based on size or "impairment".

Comment: Wetland classification types listed in 327 IAC 2-1.8-4 should include a designation for ephemeral or temporary wetlands. They serve to hold water thereby reducing flooding, provide ambient moisture, and reduce desiccation. Quite a number of beneficial organisms, namely damselflies, depend on temporary wetlands for their normal life cycles. Damselflies cannot survive in fish populated waters, and temporary wetlands are very dependent on specialized invertebrate aquatic predators for the control of undesirable organisms such as mosquitoes. (Smol)

Response: The definition of "wetlands" conforms to the definition established by the Corps of Engineers in regulation and in the Corps of Engineers 1987 Wetland Delineation Manual. This definition allows for "ephemeral or temporary wetlands", and IDEM currently considers wetland areas such as these that meet the regulatory definition to be waters of the state that are protected under these rules. The wetland types listed in 327 IAC 2-1.8-4 were chosen based on their higher sensitivity to disturbance, rarity, and lower potential to be adequately replaced by compensatory mitigation. Ephemeral wetlands, while considerably important for the reasons cited by the commentor, do not meet the criteria set by IDEM and developed in concert with the Department of Natural Resources and the U.S. Fish and Wildlife Service.

Comment: The condition about no practicable alternative that would have less adverse impact on the wetland ecosystem that is discussed in 327 IAC 2-1.8-5 applies to both Tier I and II wetlands. The draft wetland water quality standards rule should not be left open to subjective interpretation by asserting that the no practicable alternative assessment will be more strictly enforced for a Tier II wetland which is the effect of the language about the presumption of practicable alternatives existing for a Tier II wetland. The no practicable alternative language should be strictly enforced for all wetlands. (SDCF)

Response: The intent of this language is to clearly indicate to the regulated community that Tier II wetlands carry a higher degree of protection. For this reason, the burden for demonstrating that an impact is necessary or in compliance with water quality standards is significantly higher. Practicable alternatives are also presumed to exist for non-wetland dependent activities occurring in Tier I wetlands under Article 17.

Comment: The term practicable alternative needs to be defined. (NiS)

Response: Response: The term "practicable", as it is applied in the term "practicable alternative", is defined at 327 IAC 2-1.8-2(20) and 327 IAC 17-1-4(28).

Comment: The wetland water quality standards rule at 327 IAC 2-1.8-5(b)(2)(i) needs to delete any presumption that there is a practicable alternative available for a Tier II wetland. (Gary)

Response: The intent of this language is to clearly indicate to the regulated community that Tier II wetlands carry a higher degree of protection. For this reason, the burden for demonstrating that an impact is necessary or in compliance with water quality standards is significantly higher.

Comment: The wetland rules need to require that an alternative of doing nothing to the wetland is considered among the practicable alternatives to be assessed with every project. It is predictable that drainage boards will be quick to find that there is no practicable alternative to doing what they have always done which is to continue dredging, dozing, filling, and spraying. The term "practicable" implies that there must be an economic analysis of the proposed project. State regulators have been loath to review the economic analysis of local drainage boards, but many problems have resulted from not conducting such review. Agricultural interests often assert fabulously exaggerated claims of damages due to flooding and unfounded claims of drainage benefits. (MRL)

Response: IDEM believes the draft rules address this issue. All non-water dependent projects are required to have, as a part of the alternatives analysis, a discussion of a no-build alternative that would entirely avoid impacts to a wetland and other waters of the state. Water-dependent projects are presumed to not have alternatives, but the review process requires full minimization of adverse impacts and mitigation for any impacts remaining. IDEM is aware that there can be many different ways to achieve a project goal and the review procedures place a strong burden on the applicant to find the way that has the least impact to water resources.

Comment: The new wetland rules do not propose mitigation as an alternative to construction in wetlands but, according to 327 IAC 2-1.8-5, require a demonstration of no degradation to aquatic ecosystems in addition to mitigation. This is not practicable or environmentally necessary and will stifle beneficial development. How will IDEM determine what is necessary to accommodate social and economic development? Without this criteria established in the rules, IDEM will have unbridled discretion to prohibit projects that landowners or developers could otherwise carry out on their own under current law. IDEM's stated purpose for developing the new wetland rules, achieving no net loss of wetlands, could be satisfied through mitigation alone without the rule requirements for antidegradation demonstrations. (NCo)

Response: 327 IAC 2-1.8-5(b) allows compensatory mitigation to be used but also requires the applicant to show there will be no significant degradation to aquatic ecosystems. If the applicant cannot show there will be no significant degradation, then IDEM does not believe it is appropriate to allow the impact. The requirement to demonstrate that the project will accommodate important social and economic development in the area only applies to Tier II wetlands and stems from federal and state antidegradation requirements. The factors that IDEM will consider in making the determination as to whether this requirement has been met are set forth in 327 IAC 17-3-5(h). Given the rarity of the wetland types listed as Tier II wetlands, IDEM believes it is appropriate to impose a higher bar in allowing impacts to these particular wetland types.

Comment: The term "significant degradation" as used in 327 IAC 2-1.8-5(b)(1)(B) needs to be defined. (RSI)

Response: As the draft language indicates, a determination of whether an impact will result in significant degradation will be made using the criteria set forth in 40 CFR 230.10(c), which clause (B) incorporates by reference. The federal rule clarifies what is meant by "significant degradation".

Comment: An impact of one-tenth (0.1) acre or greater should not be presumed to be a significant impact as used in 327 IAC 2-1.8-5(b)(1)(D) and elsewhere in the wetland rules. (Gary)

Response: The one-tenth (0.1) acre criteria was developed after consultation with the Environmental Protection Agency, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the Indiana department of natural resources to insure consistency among the agencies. This acreage number has been determined by all agencies to truly reflect a minimal impact based on review of the following: (1) previously approved projects; (2) projects that required mitigation; (3) the size and type of wetlands in Indiana; and (4) the potential singular and cumulative effects of impacts to wetlands of this size. Furthermore, the current Corps of Engineers policy regarding wetland impacts states all impacts greater than one-tenth (0.1) acre will require mitigation. This means IDEM is consistent with federal requirements.

Comment: Applicable rules for solid waste, air quality, and department of natural resources need to be included at 327 IAC 2-1.8-5(b)(1)(D)(vi). (RSI)

Response: IDEM assumes that by asking that these applicable rules be included in the wetland water quality standards draft rule the commentor means the citations to the rules. The rule already cites to the federal and state statutory provisions that require or otherwise authorize the projects which the commissioner shall consider in making a determination whether the project will have a significant impact on water quality. It is not necessary to include citations to all possible applicable rules.

Comment: The language of 327 IAC 2-1.8-5(b)(2)(C) concerning antidegradation demonstration for Tier II wetlands is inconsistent with the language at 327 IAC 17-3-5(m). The clause (C) uses wording of "degradation is necessary to accommodate important social and economic development in the area..." while the subsection (m) uses wording of "the proposed project would support important social and economic development in the area...". The language of subsection (m) supports the argument of regulated entities that the necessary condition of a proposed project applies only to its technical aspects. This interpretation is incorrect in that the necessity test should be broad, applying not only to the technical details of the project but also to its economic and social importance to the affected area. The appropriateness of applying the necessity test to the economic and social importance of the project is especially clear in the case of Tier II wetlands since all proposed wetland impact even impacts to Tier I wetlands must first prove their technical necessity as required by 327 IAC 17-3-4(a)(1). If IDEM only applies the necessity test to the technical details of a proposed project then there is no purpose in determining important social and economic development because every development project will be deemed to support important social and economic development by those who stand to benefit from them. To provide consistency between these two areas of the wetland rules, 327 IAC 17-3-5(m) should be changed to read as follows: "The department shall approve an antidegradation demonstration only if it determines that the proposed project is necessary to support important social and economic development in the area and would not result in an unacceptable environmental impact.". (GCTF)

Response: IDEM has modified the rules to conform to the federal antidegradation standard at 40 CFR 131.12.

Comment: The antidegradation requirements for Tier II wetlands at 327 IAC 2-1.8-5(b)(2)(B) do not clearly state what IDEM will consider to be significant impacts. For a Tier I wetland, an impact on a tenth (0.1) of an acre is considered significant, but Tier II impacts are not covered under this language. The rule should convey the appropriate rarity to Tier II wetlands that they deserve by establishing that any impact to a Tier II wetland is significant. (GCTF)

Response: The draft rules have been revise to reflect this comment.

Comment: In northwestern Indiana, particularly, subsurface hydrology is connected which means that wetlands can impact nearby fields and, conversely, drainage of agricultural land can impact neighboring wetlands. Therefore, the exemption in the wetland rules for de minimus amounts of impacts such as for wetlands less than a tenth (0.1) of an acre is an acceptable idea if it is carefully defined. (MRL)

Response: The draft rules provide clear criteria for when this exemption is applied. Further, the draft rule specifically limits this exemption to Tier I waters only; this recognizes that Tier II waters, even those of small size, need to be evaluated case-by-case to provide maximum assurance that proposed activities do not adversely impact these sensitive aquatic ecosystems.

Comment: The requirement to complete compensatory mitigation prior to impacting some Tier I and all Tier II wetlands should be eliminated from the draft rules because construction schedules would be impossible to plan and implement and development partners would not wait two (2) to five (5) years to see if mitigation were successful. (Gary)

Response: The up-front mitigation requirement does not apply to Tier I wetlands. Secondly, little evidence currently exists to show that many of the Tier II wetland types are mitigatable. It is reasonable to allow for advancements in the field of wetland mitigation; therefore, IDEM has allowed persons the opportunity to attempt to recreate these wetland types. Given the current level of uncertainty, it is necessary to require a demonstration of success prior to allowing impacts. Further, this comment ignores the other aspects of Tier II antidegradation review, such as the requirement to clearly show no other alternatives are viable and that the project has a socio-economic justification; mitigation is a last effort and, therefore, should not be the driving consideration when planning a project.

Comment: The requirement of 327 IAC 2-1.8-5(b)(2)(B)(ii) to complete compensatory mitigation prior to impacting a Tier II wetland should be eliminated in favor of the use of incentives such as a wetland bank. This advance mitigation requirement will put most projects on hold for three (3) to five (5) years making the project infeasible. (ISEG, NiS)

Response: Little evidence currently exists to show that many of the Tier II wetland types are mitigatable. It is reasonable to allow for advancements in the field of wetland mitigation; therefore, IDEM has allowed persons the opportunity to attempt to recreate these wetland types. Given the current level of uncertainty, it is necessary to require a demonstration of success prior to allowing impacts. Incentives, such as performance bonding, do not eliminate the uncertainty of recreating these wetland types. If a mitigation bank successfully restores an acid bog, then applicants could use this bank as up-front mitigation.

Comment: 327 IAC 2-1.8-5(c) concerning the commissioner considering the designated and existing uses provided by a wetland, whether the wetland is habitat for threatened and endangered species, and cumulative impacts in a watershed is very essential for strong protection of wetlands. (SO)

Response: These factors are important elements to evaluating a given project and its potential impact to water quality. IDEM has and will continue to use these factors to assess all aspects of a given project during its regulatory review processes.

Comment: One of the most frequently stated beneficial uses of a wetland is its ability to function as a natural filter for removal of pollutants from waters entering our streams, lakes, and ponds. EPA has recognized this function of sediment/toxic retention and nutrient removal/transformation in its 1990 Guidance (see page 14 of the Guidance) as examples of typical wetland beneficial uses. The draft wetland rules prevent wetlands from functioning to fulfill the existing beneficial use of natural filtration by regulating inflow of certain types of pollutants at levels forbidden by the GLI. (Gary)

Response: The referenced section of the National Guidance Water Quality Standards for Wetlands (1990) does not list "typical existing beneficial uses". This section refers to, in USEPA's words, "wetland functions that directly relate to the physical, chemical and biological integrity of wetlands". While wetlands may have as a natural function some of the "uses" described by the commentor, the Clean Water Act does not allow the designation of wetlands or water bodies as pollution control structures or permit water bodies to be used to treat pollution, either non-point or from a point source. Although wetlands naturally remove nutrients and trap sediments, IDEM would not propose that treatment or filtration of pollutants from water is an appropriate designated use.

Comment: The removal, as suggested during the original comment period for the draft wetland rules, of endangered species as an indicator of Tier II wetlands was a good change to the present draft rules; however, the state endangered species have been reinserted at 327 IAC 2-1.8-5(c)(2). This subdivision of the draft rule should only refer to the federally listed endangered species because many state listed species are common elsewhere but on the edge of their natural range in Indiana and their presence is not limited to high quality wetlands. As well, the state endangered species list contains records decades old. Protection of state endangered species should be accomplished through a separate legislative or regulatory action. Threatened and endangered species do need protection, but it is not appropriate to provide such protection through wetland water quality standards and the 401 water quality certification process as these species are already protected at both the federal and state level. (AEP, NiS)

Response: The referenced section refers to other factors the Commissioner shall consider when evaluating projects that may degrade water quality. While this factor was removed in the section of the draft rule dealing with Tier II wetland designation, IDEM maintains that this factor is still important and is clearly under the authority of the Commissioner to consider under water quality standards. Biological and physical properties of wetlands are protected under the draft standards; impacts to these directly affect water-dependent species short and long-term viability. Further, threatened and endangered species tend to be more sensitive to alterations of the aquatic environment.

Comment: IDEM's authority to regulate water quality for all waters of the state is not at issue; nevertheless, it seems there is a question as to how well the surface water criteria listed in 327 IAC 2-1.8-6(a) apply to wetlands. How does the exclusion for waters below stream design flow affect the application of these criteria to wetlands? Doesn't IDEM have sufficient authority under the requirements of 327 IAC 2-1.8-6(c) to ensure that water quality in wetlands is maintained to protect aquatic and wildlife? IDEM should have the authority to prevent runoff or other discharges from contaminating wetlands, and the inclusion of criteria to control ammonia and human fecal coliform is a necessary protective measure, but the prohibition in 327 IAC 2-

1.5-8(c)(1) against substances that result in offensive odors in the vicinity of the water is probably not a necessary prohibition nor is it even a desirable protection in the case of wetlands. (AEP, GCTF)

Response: 327 IAC 2-1-5 and 327 IAC 2-1.5-8(a) contain provisions designed to provide relief to permitted dischargers in the event stream flows fall below the stream's Q7,10 flow (since the permit limits are based on the stream's Q7,10 flow). These provisions do not apply to wetlands (as they do not apply to lakes) since they do not have stream flows. The standards set forth in 327 IAC 2-1.5-8 and 327 IAC 2-1-6, which include numeric as well as narrative criteria, apply currently to all wetlands. With a few exceptions (such as pH) to reflect the specific chemical or physical characteristics of wetlands, IDEM believes they are appropriate and should still apply to wetlands. There is no reason why dischargers of pollutants to wetlands should be subject to less stringent requirements than dischargers to other waters. The narrative requirements in 327 IAC 2-1.8-6(c)(1) provide additional protection to wetlands, not equivalent protection. One of the reasons Congress amended the CWA to require states and EPA to adopt specific numeric criteria for toxics was that the narrative standard (no toxics in toxic amount) was not providing sufficient protection, and it was difficult to trace water quality problems back to specific dischargers. The prior approach also led to a reactive approach instead of a proactive one.

Comment: It is inappropriate that the wetland water quality standards rule applies water quality criteria for open water in the Lake Michigan basin from the Great Lakes Initiative (GLI) to all wetlands. For certain wetlands like acid bogs and emerging wetlands, requiring discharges to them not to exceed any of the GLI criteria would have the result of either destroying the wetland or, at a minimum, stopping its evolution and growth. Such a result would be a violation of the letter and the spirit of the Clean Water Act and related EPA regulations and similar Indiana laws and regulations regarding protecting wetlands. Wetland specific criteria need to be developed for each category of wetland. "As stated in EPA's 1990 National Guidance, Water Quality Standards for Wetlands, Water quality standards specifically tailored to wetlands provide a consistent basis for the development of policies and technical procedures for managing activities that impact wetlands." (Gary)

Response: The references to existing water quality criteria set forth in 327 IAC 2-1.5-8 refer only to certain narrative criteria; criteria for toxic substances for aquatic life, other wildlife and humans; criteria to protect against substances that would impart taste or odor to fish flesh; criteria to protect against toxic levels of ammonia, and bacteriological criteria to protect human health. IDEM is not aware of any evidence that any of these criteria would in any way result in destroying or stopping evolution or growth of wetlands or wetland organisms. Rather, IDEM believes that these criteria would be protective of the wetlands and the organisms that might be associated with wetlands. These references to existing criteria exclude the criteria for pH, dissolved oxygen, temperature, etc. that certainly may be different for wetlands than other water bodies. These parameters are included in 327 IAC 2-1.8-6(b) which refers to the "…biological, chemical, and physical characteristics naturally present in wetlands…".

Comment: Establishing the same water quality standards for all wetlands as is accomplished by 327 IAC 2-1.8-6(a) is a direct violation of IC 13-14-8-4 that requires IDEM to take local conditions and actual uses into account when setting standards. (NCo)

Response: Subdivisions (b) and (c) of 327 IAC 2-1.8-6 must also be considered when commenting on the rule's taking into account local conditions and actual uses. Those subsections

do allow some site-specific water quality determinations to be used. Subsection (a) specifically applies the criteria of (b) and (c) to wetlands.

Comment: The term "use attainability analysis" as used in 327 IAC 2-1.8-6(d) needs to be defined. (RSI)

Response: IDEM has added a reference to the federal rules that control use attainability analyses (40 CFR § 131.10).

Comment: The concept of performing a use attainability analysis as described in 327 IAC 2-1.8-6(d) should be expanded so that it applies not only to nonanthropogenic sources of fecal contamination but also to the other specified water quality criteria as well. (AEP)

Response: This provision is based on the federal provision that allows states to remove a designated use due to "naturally occurring pollutant concentrations." (IDEM has modified the rule to reflect that it only applies to designated uses.) This provision was added to address concerns that the *E.coli* criteria could not be achieved in wetlands due to the presence of geese and other waterfowl. IDEM does not believe it would be appropriate to expand the rule to apply to all other water quality criteria.

Comment: A definition of Outstanding State Resource Water (OSRW) needs to be included at 327 IAC 2-1.8-7; otherwise, all references to OSRW should be deleted throughout the draft wetland rules. Three (3) of the five (5) criteria of 327 IAC 2-1.8-7 should be mandatory for designation of an Outstanding National Resource Water (ONRW) rather than just one (1). It is also suggested that the word "National" be inserted after "Exceptional" in 327 IAC 2-1.8-7(2) and 327IAC 2-1.8-7(3) and that subdivision (4) of section 7 be deleted as it is too general to be used by itself as the basis for any ONRW designation. (AEP, NiS)

Response: The statutory definition of OSRW can be found at IC 13-18-3-2(e). The definition of ONRW contained in the rule simply repeats the definition approved by the General Assembly at IC 13-18-3-2(d). Any change to either definition would have to occur in the General Assembly.

Comment: OSRW should not be mentioned in these rules pending development of new OSRW rules under SEA 431. (Gary)

Response: SEA 431 does require the WPCB to adopt rules that establish the procedure for designating a water as an OSRW. However, some Outstanding State Resource Water (OSRW) wetlands already exist within the Dunes National Lakeshore (all waters within the Dunes National Lakeshore are designated Outstanding State Resource Waters in 327 IAC 2-1.5-19(b)(3)) and protection is needed for these waters. These waters will continue to be protected under existing rules until the WPCB adopts new OSRW rules under SEA 431.

Comment: The wetland rules as drafted are critical for developers as well as for conservation interests. Growth has been accelerating in the counties of the Lake Michigan and Lake Erie watersheds and, at the same time, public concern has been growing for protection of natural areas as essential for the quality of life today and for future generations. Wise developers are increasingly aware that development that protects natural areas has higher value, but the developers need to know which areas need protection. These draft wetland rules provide the mechanisms to aid developers. (LB)

Response: A major component of this rulemaking, since its inception, has been to promote clear, consistent, and comprehensive rules that guide developers during the planning process. These draft rules provide a complete picture of IDEM's regulatory review processes and indicate which wetlands are more sensitive to development activities, allowing for more well-planned and environmentally-friendly projects.

Comment: Indiana has, in general, done a poor job of preserving its aquatic resources. In the long run, Indiana can only progress by improving its quality of life so that smart, talented, progressive people will want to live and remain here, and preserving our waters including wetlands is a central part of enhancing the quality of life for all Hoosiers. For the attorney representing clients who want to preserve and enhance natural resources in general and wetland areas in particular on their own property, there is ample evidence that government in Indiana does not make this an easy task. County drainage boards and county surveyors are the single most potent enemies of wetlands in Indiana. Empowered by the antiquated Indiana Drainage Code and supported by powerful agricultural interests, drainage boards damage or destroy wetlands and riparian habitat throughout Indiana at public expense with practically no regulation and no meaningful opportunity for review. (MRL)

Response: The draft rules do not impinge on the authority of local units of government. IDEM recognizes that the Indiana Drainage Code may give the impression that agricultural drainage must occur above all other laws, but environmental rules also play an important role. IDEM is committed to insuring public involvement, education, and compliance with its rules and regulations.

Comment: Far too many wetland acres have been converted to agricultural use and most of what remains is degraded. An exemption is not a problem for prior converted wetlands that are actively farmed areas; however, if drainage boards are allowed to use such an exemption claiming prior converted wetland merely by saying it is so, then the exemption will be abused. At a minimum, the owner of the wetland property must be required to verify in writing and supply supporting evidence that the wetland in question is in fact a prior converted wetland, and the request for an exemption for a prior converted wetland must come from the property owner. (MRL)

Response: The term "prior converted wetland" is used by the Natural Resources Conservation Service (NRCS) when evaluating agricultural land under the "Swampbuster" provisions of the Farm Bill. IDEM has and will continue to work directly with the NRCS when making this determination. In many cases this information may come from the landowner or the project sponsor, but in all cases IDEM verifies the information with NRCS. The draft rules will not change this process.

Comment: The new wetland rules will impose significant and economically unreasonable burdens and place particularly egregious limitations on the free use of land for private landowners especially farmers. If a farmer cannot currently farm in a wetlands area or if a wetland is created by a broken field tile or other drainage problem and the area is bigger than one-tenth (0.1) acre, then the farmer can never fill the area without first obtaining IDEM's permission. IDEM has stated that even natural sedimentation of wetlands would be regulated by the new wetland rules if the sediment results from poor farming practices. IDEM does not define poor farming practices, but it seems to mean a farmer must become proactive in safeguarding a wetland from silting up. By regulating passive activities, IDEM is exceeding its statutory authority to regulate discharges. (NCo)

Response: Problems with sedimentation caused by poor farming practices are not "natural" sedimentation but are due, instead, to human activity. Any sedimentation in wetlands that is truly natural would not be regulated by this rule. If a broken field tile eventually gives rise to the formation of a wetland, then the commentor is correct that the wetland would be regulated under these draft rules.

Comment: The reliance on IC 13-18-3-1 for authority to implement the surface water modification permit program is misplaced when dealing with small, isolated wetlands where the presence of water is intermittent and ephemeral. The statutory authority does not extend to placement of clean fill on dry land and does not extend to disturbances of the soil when the area is dry. Agricultural wetlands are regulated by the Natural Resources Conservation Service (NRCS), and IDEM is encouraged to formally acknowledge and defer to the technical expertise of the NRCS where applicable to reduce bureaucracy for farmers. In the wetland rules as drafted, IDEM's broad application of its authority could have unintended consequences of requiring any area where water may have been at any time to obtain a surface water modification permit. If the goal of the surface water modification permit program is only to recapture lost isolated wetlands then the rule should, at the very least, contain a verbatim list of exemptions from the Clean Water Act, 33 U.S.C. 1344, because farmers should be allowed to conduct the activities permitted under the Clean Water Act prior to the SWANCC decision. Normal farming activities such as maintenance of farm drainage should be allowed without a surface water modification permit. (IFB)

Response: The rules do not regulate areas "where water may have been at any time", but they do regulate wetlands which are defined in the rules. The goal of the surface water modification permit program is not "only to recapture lost isolated wetlands" but to protect all existing wetlands in the state. The commentor is correct in that IDEM's authority does not extend to the placement of clean fill on dry land. However, a water body that meets the definition of "wetland" is not "dry land" for purposes of this rule if the wetland happens to be dry at some discrete point in time. The definition of wetland does not require the area to be inundated or saturated at all times.

Comment: Previous comments expressed by the Farm Bureau include the belief that agricultural wetlands should only be under the jurisdiction of the Natural Resources Conservation Service (NRCS). It may be different in other counties, but in LaPorte County the local NRCS has proven that wetland protection needs to be under the authority of an agency that is not interested in farming exclusively. This is not an anti-agriculture belief but it is recognition that an agency is needed that is dedicated to preserving the few wetlands that are remaining in Indiana. (BOVG)

Response: IDEM appreciates the fact that the NRCS administers certain programs that impact how agricultural producers utilize and manage aquatic resources as a part of regular farming activities. This rulemaking in no way impinges upon these programs, nor sacrifices one agency's authority in favor of another. IDEM has worked with the NRCS to insure that these rules are not duplicative nor in conflict with NRCS rules and policy. IDEM continues to be committed to the wise regulation of aquatic resources and insuring their protection and eventual improvement.

Comment: The intent and applicability of sections 1, 2, and 3 of 327 IAC 17-1 are not clear. Section 2 relates to federal permits that are already required for almost all projects and for which there are federal exemptions and general permits. Section 3 expands upon section 2 so that any activity would be subject to some form of permit. Section 3 (a) appears to conflict with section 3(d) regarding water quality certification. 327 IAC 17-1-3(b) appears to eliminate the need for an individual, Rule 5 or Rule 6 permit. Clearly, the extent of the permit program is not manageable; therefore, it is essential that a system of general permits, permits by rule, and reasonable time limits be developed and noticed in this rulemaking. Furthermore, a facility

subject to other permits that have water quality rules should not be required to obtain another permit. (RSI)

Response: The specific conflict referred to between 327 IAC 17-1-3(a) and (d) is not clear as the rule contains no 327 IAC 17-1-3(d). Section 3 does not require a permit for "any" activity. That section applies to "activities that do not require a water quality certification under section 2 ... and involve placement of dredged or fill materials, excavation, or mechanical clearing of vegetation." IDEM fails to see a connection between activities regulated by 327 IAC 17-1-3(b) and the construction and industrial activity stormwater rules at 327 IAC 15-5 and 15-6.

Comment: The exclusion in 327 IAC 17-1-3(a) from the need of a surface water modification permit for activities in a prior converted wetland needs to be enhanced with a stipulation that these wetlands are to be protected if and when the Swampbuster provisions in current federal regulation are changed to lessen the existing protection. (SDCF)

Response: IDEM cannot place speculative language within its rules that would change the standard at some indefinite time in the future. If and when the federal regulations are modified so that the concept of "prior-converted wetland" is removed or constrained, IDEM would reevaluate its wetland rules to determine if any changes would need to be made.

Comment: Man made ponds and wetlands should be exempted from surface water modification permit and 401 water quality certification requirements. (NiS)

Response: IC 13-11-2-265(a) defines waters of the state to include "accumulations of water ... natural and artificial....". Man made waters that do not meet the criteria for exemption under IC 13-11-2-265(b) are waters of the state and subject to regulation by IDEM.

Comment: A state permitting program to protect wetlands that the Supreme Court removed from federal jurisdiction by way of the SWANCC decision is a necessary component for meaningful state wetland rules. However, the applicability of a surface water modification permit according to 327 IAC 17-1-3(b) should be connected to Section 401 water quality certifications rather than to NPDES permits. A surface water modification permit should be required for an activity that would have required a 401 water quality certification prior to the date of the SWANCC decision. (GCTF)

Response: IDEM believes that the proposed language in 327 IAC 17-1-3(a) does require those activities that would have required a 401 water quality certification prior to the date of the SWANCC decision to obtain a surface water modification permit.

Comment: The exclusions allowed by 327 IAC 17-1-3(b) mirror the exemptions allowed by the Corps of Engineers' 404 permit, but several of the exclusions are objectionable because they would allow for significant impacts to Indiana's wetlands and should not be adopted simply for the sake of consistency with Corps procedures. The following language taken from Virginia's wetland regulations should be used in Indiana's wetland rules: "To fall under the exclusions listed at 327 IAC 17-1-3(b)(1), activities must be part of an established (for example, ongoing) agriculture or silviculture operation. Activities on areas lying fallow as part of a conventional rotational cycle would be considered part of an established operation. Activities which bring a new area into agricultural or silvicultural use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.". (SDCF)

Response: This potential issue has been addressed in the exemptions by the addition of a recapture clause, mirrored after the Clean Water Act Section 404(f) clause. This language states that a surface water modification permit shall be required for any discharge of pollutants into

waters of the state that would otherwise be exempted if the discharge would bring an area of the water into a use to which it was not previously subject; or the flow or circulation of the water may be impaired or the reach reduced by the discharge.

Comment: The construction of the various roads listed in 327 IAC 17-1-3(b)(3) should not be given exemption. There are existing and potential (for surface water modification permits) general permits that accommodate activities that are similar and result in insignificant impact. (SDCF)

Response: This potential issue has been addressed in the exemptions by the addition of a recapture clause, mirrored after the Clean Water Act Section 404(f) clause. This language states that a surface water modification permit shall be required for any discharge of pollutants into waters of the state that would otherwise be exempted if the discharge would bring an area of the water into a use to which it was not previously subject; or the flow or circulation of the water may be impaired or the reach reduced by the discharge.

Comment: Electric utility right of way maintenance would almost certainly be exempted under 327 IAC 17-1-3(b) because it does not entail any fill, excavation, or mechanical clearing and does not typically require an NPDES permit; however, for the sake of precise clarity, it is suggested that right of way maintenance be listed as an exempted activity. The following is suggested language: "Maintenance of right of ways for above, or below ground utility lines. "Utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission of any purpose of electrical energy, telephone, and telegraph messages, and radio and television communications. Maintenance would include any manual, mechanical, or approved chemical means of controlling woody vegetation but would not include mechanical clearing as defined in 327 IAC 2-1.8-2.". (AEP)

Response: There is no need to create this type of exemption, as the activity described in this comment is already not considered a jurisdictional activity. Clearing of vegetation in a utility right of way, except for mechanical clearing as defined in the rule, is not currently regulated under this program and would not be once these rules become adopted, since the activities do not result in placement of dredged or fill materials, excavation, or mechanical clearing of vegetation in waters of the state.

Comment: The effects of surface coal mining including the surface effects of underground coal mining on wetlands are comprehensively regulated under the Indiana Surface Mining Control and Reclamation Act (ISMCRA), IC 14-34, and the regulations adopted thereunder. This comprehensive regulation applies to wetlands regardless of Section 404 jurisdiction under the Clean Water Act. In order to prevent regulatory duplication with ISMCRA, an exemption should be included in 327 IAC 17-1-3 for coal mining activities. An additional subdivision (4) under 327 IAC 17-1-3 is suggested to read as follows: "(4) Surface coal mining and reclamation operations including surface effects of underground coal mining authorized by a permit issued by the department of natural resources under IC 14-34.". Additionally, it is suggested that 327 IAC 17-1-3(c) be amended to read as follows: "(c) A surface water modification permit, if issued by the department, or a surface coal mining and reclamation operations permit issued by the department of natural resources under IC 14-34 may serve as a water quality certification for the purposes of Section 401 of the Clean Water Act, 33 U.S.C. 1341.". (Coal)

Response: IDEM does not believe that an exemption is needed for activities regulated by the Indiana Surface Mining Control and Reclamation Act (ISMCRA), IC 14-34. Currently,

Nationwide General Permit 21, administered by the Corps of Engineers, covers the activities regulated under ISMCRA. IDEM has granted water quality certification for this general permit. Additionally, IDEM will develop a similar general permit under the surface water modification permit program upon preliminary adoption of these draft rules and will make this language available for review before final adoption.

Comment: Wetlands delineations need to performed reliably and reasonably promptly. All large drainage projects should be accompanied by in-field wetlands delineations conducted by qualified and disinterested professionals. Experience has shown that, given an opportunity, many drainage boards will subvert the delineation process by claiming that no wetland is present in the proposed project area. (MRL)

Response: The draft rules at 327 IAC 17-2-1 specify that all applications must have a wetland delineation performed in conformance with the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual. Both IDEM and the Corps of Engineers review these documents for accuracy. Additionally, IDEM routinely inspects proposed projects to verify that information submitted as a part of the application accurately depicts all waterbodies, including wetlands.

Comment: It is suggested that at 327 IAC 17-1-4(9)(B)(ii) the wording "removal of vegetation by mechanical clearing" should replace "clearing of vegetation". (ACI)

Response: The commentor is referring to the definition of "commencement", a term used to describe when a person has begun work on a given project. The suggested language unduly constrains this definition, allowing a person to denude a project site of vegetation without using machinery and then claim that no work has occurred on the site. This is not consistent with IDEM's current regulatory process.

Comment: The extensive application requirements of 327 IAC 17-2-1 are duplicative of the federal requirements that already apply, create an unnecessary burden, and should be deleted. The Federal Water Pollution Control Act (FWPCA) requires the states to do the following: (1) certify that a discharge into navigable waters of the United States will comply with applicable effluent limits and water quality standards; and (2) establish procedures for public notice and, where appropriate, for hearings in connection with specific applications for discharge. The draft wetland rules have gone extremely beyond the requirements of the FWPCA. (Beth)

Response: The CWA requires Indiana to certify that discharges to wetlands and other waters of the state, including the placement of dredged and fill material, excavation, and mechanical clearing, will comply with Indiana's wetland water quality standards. The draft rule sets forth the means by which that federal requirement will be met.

Comment: Granted, this is a point of considerable detail, but the wording of 327 IAC 17-2-1(a)(7) actually omits the property owners upon whose land a project may be conducted. Many county drainage boards typically own no land themselves but apply for permits to conduct dredging and tree killing operations on land owned by citizens who would not be included in the names required under the current wording of 327 IAC 17-2-1(a)(7). These affected citizens are not adjacent property owners; they own the land at the site of the project. It is suggested that subdivision (7) be reworded to state "provide a list of names and addresses of property owners adjacent to the proposed project and those that own the land where the project is planned to be conducted; and". (MRL)

Response: The draft rules have been revise to reflect the suggested language.

Comment: Where the Natural Resources Conservation Service (NRCS) provides project assistance, it will not be able to sign the statement found in 327 IAC 17-2-1(b) and required to be submitted with an application. This may be a problem for the landowner. NRCS would like

IDEM to recognize and approve wetland mitigation proposals completed by competent qualified NRCS personnel. (NRCS)

Response: IDEM recognizes that, in certain circumstances, wetland mitigation plans may be prepared and submitted on behalf of an applicant by NRCS personnel. Also, NRCS personnel may even assist in the preparation of a given application. However, since the applicant is legally responsible for the conduct of the project and compliance with appropriate state laws and regulations, the applicant, not the agent, must sign the form. Applicants for all types of permits reviewed by IDEM are required to sign application forms. IDEM believes the rule language as drafted properly addresses this situation.

Comment: The time allowed by 327 IAC 17-2-1(e) for an IDEM decision on a 401 certification needs to be shortened from one (1) year to ninety (90) days. (Gary)

Response: The draft wetland rules on public notice for this October 2001 comment period do not contain a 327 IAC 17-2-1(e).

Comment: Application review time periods allowed under 327 IAC 17-2-2 and 327 IAC 17-5-1 are too long. Previously, IDEM had thirty (30) days to issue a water quality certification for a Corps 404 permit. This is now expanded to one hundred fifty-five (155) days under 327 IAC 17-2-2 and to more than a year under 327 IAC 17-5-1.This amount of time may be reasonable for complex projects but not for some simple ones; therefore, an extensive general permit and permit by rule program is necessary with automatic issuance after thirty (30) days. (RSI)

Response: IDEM has modified the draft rules to create a review period of 120 working days for a complete application; a maximum 30 days for completeness review and an additional 90 days for permit review.

Comment: 327 IAC 17-2-2(f)(2) should be enhanced to specify that if IDEM fails to act within the one hundred twenty (120) days then the water quality certification or surface water modification permit shall be deemed waived. (AEP, NiS)

Response: The draft rules already contain a provision for waiver of water quality certification or surface water modification permit. 327 IAC 17-5-1(a)(5) states that the department shall waive a water quality certification or surface water modification permit if the department fails to make a final determination within one (1) year of its receipt of a complete application unless the federal permitting agency chooses to accept a certification subsequent to the expiration of one (1) year. This is consistent with the Clean Water Act provisions and IDEM sees no reason to deviate in this regard.

Comment: The comment period allowed under 327 IAC 17-2-3(b)(7) must be thirty (30) days to allow a reasonable time for interested parties to research the application and provide meaningful comments. IDEM is given thirty (30) days under 327 IAC 17-2-2(e)(2) to determine and notify an applicant that a response to a notice of deficiency is inadequate. The public should be given an equal amount of time to receive, review, and comment on an application to impact a wetland. (GCTF, SDCF)

Response: The draft rules have been revised to reflect the suggested language.

Comment: The provisions of 327 IAC 17-2-3(c) need to be broadened concerning IDEM's providing notice of an application. The draft rule requires IDEM to provide notice to adjacent property owners and specified governmental agencies; however, other members of the public may be affected by and take an interest in activities that impact wetlands. A legal notice in local newspapers would provide notice to a wider range of potentially affected parties. Legal notices are routinely published for other kinds of water and air pollution permit applications

submitted to IDEM, and wetland protection is equally deserving of this level of public notice. Other means of public notice should also be utilized such as entering application information on the IDEM website. This is already standard practice for the Office of Air Quality. (CM)

Response: IDEM does not believe there is a need to public notice applications through the use of a legal notice. IDEM has a joint public notice process with the Corps of Engineers, which covers most projects that may have wide public interest. IDEM will, however, place public notices on its website, upon completion of a modernized wetland permit database.

Comment: Clarity could be enhanced if 327 IAC 17-2-5(f) were changed to read as follows: "The department shall consider comments received at the public hearing or meeting or submitted to the department within fourteen (14) days after the public meeting or hearing before a decision may be rendered on the application.". (GCTF)

Response: IDEM has removed this language from the draft rules.

Comment: At 327 IAC 2-1.8-5(b)(1)(D), the water quality standards include consideration that IDEM will assess the proximity of the site of impact to other waters or natural areas during application review. This same type consideration needs to be included at 327 IAC 17-3 for review of applications for water quality certifications and surface water modification permits. (SDCF)

Response: The consideration of proximity under 327 IAC 2-1.8-5(b)(1)(D) applies specifically to an antidegradation determination of whether a proposed project will significantly impact water quality in a Tier I wetland. The requested consideration is already covered under 327 IAC 17-3-3(a) and 17-3-3(c).

Comment: The minimization test included in 327 IAC 17-3-3 for water dependent projects in Tier I wetlands needs to be consistent so it requires an applicant to make "reasonable and appropriate steps" but does not require minimization to the "greatest extent possible". (Gary)

Response: IDEM has modified the draft rule so that this language now reads in both sections "greatest extent practicable".

Comment: The requirements of sections 2, 3, and 4 of 327 IAC 17-3 could halt any project regardless of its size, proximity, or dependence on water. A restatement or elimination of the alternatives analysis should be done and size, location, and types of project exemptions established. In addition, the term "stream" needs to be defined. (RSI)

Response: There is considerable opportunity for an applicant to show that the proposed project impacts are necessary, that other options have been considered and rejected to specific reasons, and adverse impacts to water quality have been minimized. In no way do these sections block all projects or prevent any person from making an argument regarding their project. The sections do spell out how IDEM evaluates projects, which most of its current applicant agree is desirable for the agency to spell out in detail. Provisions in the rule exist for general permits that would allow projects with minor impacts to proceed with minimal review and obviating the need for an alternatives analysis. IDEM has not defined "stream", as this term is a commonly defined term in any dictionary.

Comment: It is recommended that alternative analysis only be required under 327 IAC 17-3-4 for impacts to ONRWs because it is an unreasonable burden on applicants to require an alternatives analysis for every nonwater dependent project especially for short term projects that are covered under the nationwide permitting process. (NiS)

Response: IDEM, USEPA, and the Corps of Engineers use the same criteria to assess wetland impacts. All the agencies agree that wetland impacts are presumed to be avoidable unless alternatives do not exist. IDEM uses this criterion currently when evaluating water quality

certification applications, and the draft rule merely spells out this requirement. All projects that require a site-specific water quality certification are held to this standard now and will be held to this standard under the draft rules. Applicants covered under a nationwide permit for which IDEM has granted certification are not required to conduct the alternatives analysis.

Comment: The draft wetland rule at 327 IAC 17-3-4(a)(1) needs to delete any presumption that there is a practicable alternative available for a nonwater dependent project impacting a Tier I wetland. (Gary)

Response: Water dependent projects must, as a basic purpose, require siting or location on or within water. Therefore, impacts to water resources cannot be avoided. It is reasonable to assume that a project can be configured, for example, to minimize impacts, such as relocating along a shoreline, to avoid certain wetlands, or reduce the amount of fill needed to construct foundations. This set of presumptions does not extend to nonwater dependent projects. These types of projects do not have to be sited on or adjacent to water to achieve the project goal. For example, the construction of a parking lot can occur in many different locations, while a boat dock must occur on water in order to achieve its purpose.

Comment: The draft wetland rule at 327 IAC 17-3-4(b) should allow an applicant to avoid presenting every one of the specified alternatives if there is good reason why some option should not have to be assessed. (Gary)

Response: The purpose of an alternatives analysis is to list possible alternatives and provide specific, concrete reasons why that alternative was rejected or given no further consideration. This allows an applicant the opportunity to state why the alternative is infeasible, impracticable, fails to meet the projects purpose, or any other reason. It requires an applicant to research alternatives, but produces defensible reasons for the rejection of alternatives based on facts, not supposition.

Comment: The draft wetland rule at 327 IAC 17-3-4(d) needs to limit IDEM's authority for requiring additional alternatives analysis so that such analysis can only be required if there is a basis for believing that another option is practicable. (Gary)

Response: The purpose of an alternatives analysis is to list possible alternatives and provide specific, concrete reasons why that alternative was rejected or given no further consideration. This allows an applicant the opportunity to state why the alternative is infeasible, impracticable, fails to meet the project's purpose, or any other reason. It requires an applicant to research alternatives, but produces defensible reasons for the rejection of alternatives based on facts, not supposition. The commentor's suggestion would require IDEM to "guess" whether options exist and then on a case-by-case basis, require an alternatives analysis. This would result in an unclear, unpredictable procedure and would not be acceptable to IDEM or to most, if any, applicants.

Comment: The five (5) factors in 327 IAC 17-3-4(e) and 327 IAC 17-3-5(e) are outside the range of environmental science. IDEM should be required to bring in independent expertise in regional economic development and construction design for the purpose of determining the validity of development projects and construction design. (Gary)

Response: IDEM currently considers project alternatives as described in 327 IAC 17-3-4(e) and 327 IAC 17-3-5(e). IDEM's chief responsibility in considering alternatives is to evaluate potential impacts on water quality. Therefore, alternative sites, configurations, and other project modifications are evaluated by IDEM to determine if there would be associated impacts to water quality. An applicant must decide if various alternatives will result in less impact and

still allow the goals of the project to be met. Available and viable alternatives must, therefore, satisfy water quality concerns and project purposes.

Comment: The alternative sites or locations required by 327 IAC 17-3-4(b)(2) and 327 IAC 17-3-5(b)(2) are not always available or practical. If an applicant has already completed research on various sites, this research could be included in the alternative analysis; however, requiring an applicant to conduct research on other sites when they may have only looked at one site is not practical. (ACI)

Response: The purpose of an alternatives analysis is to list possible alternatives and provide specific, concrete reasons why that alternative was rejected or given no further consideration. This allows an applicant the opportunity to state why the alternative is infeasible, impracticable, fails to meet the projects purpose, or any other reason. It requires an applicant to research alternatives, but produces defensible reasons for the rejection of alternatives based on facts, not supposition. The rule requires assessment of more than one alternative; therefore, this is not an issue of practicality. Furthermore, this research is required in many cases by the Corps of Engineers so it is not unreasonable to assume that this information is available for applicants to present to IDEM.

Comment: For agricultural projects, some level of exemption from the analysis requirements of 327 IAC 17-3-4(b) is necessary because in virtually all agricultural situations the only alternative is either conversion or not. (NRCS)

Response: If a given project has fewer alternatives available for consideration, this should not obviate the need for this analysis. If anything, situations of this type would allow an applicant more opportunity to justify a given project plan because so few alternatives exist.

Comment: The draft wetland rule at 327 IAC 17-3-5(h) needs to delete any requirement for an antidegradation demonstration for a Tier II wetland. If there are no practicable alternatives and compensatory mitigation is provided, then there should be no need for an antidegradation demonstration. (Gary, NCo)

Response: The requirement to provide an antidegradation demonstration only applies to Tier II wetlands and stems from federal and state antidegradation requirements. The practicable alternatives test and the antidegradation demonstration have two very different purposes. The practicable alternatives test takes into consideration factors unique to the applicant, such as cost and the purpose of the project; it does not mean that there is no alternative to the project. The antidegradation demonstration has a broader focus and looks at a number of things, including: economic impacts on the local community; effects on the aquatic community to be impacted; and other site-specific impacts that may result from the project. Tier II wetlands are rare and possibly impossible to replicate; consequently, they are an extremely valuable natural resource. Since their destruction has greater consequence for the public, IDEM believes it is appropriate to consider impacts to the community and ecosystem, and not just the applicant, before determining whether to allow the proposed project.

Comment: The requirements of 327 IAC 17-3-5 concerning impacts to Tier II wetlands are burdensome and will make it impracticable in most cases to impact a Tier II wetland. Northwest Indiana will especially find these requirements burdensome. Currently, this level of burden is not required. Indiana rules should be consistent with the Corps of Engineer's alternatives analysis requirements or Tier II wetlands should be eliminated as a defined type and only ONRWs and OSRWs given this great level of protection. (NiS, RSI)

Response: IDEM has consistently required applicants to provide information on project alternatives and document the various options considered as a part of the planning process. The

draft rules at 327 IAC 2-1.8-5(b)(1)(B) require an alternatives review that is identical to the Corps of Engineers process.

Comment: When IDEM decides that compensatory mitigation is needed, the mitigation must be completed and demonstrated to be successful before the project can begin. No rational builder will go near any wet spot as a result of these new rules. The new wetland rules create an unconstitutional taking. 327 IAC 17-3-4 and 327 IAC 17-3-5 are particularly egregious interferences with the free use of land and local land use regulations. There should not be any requirement for an applicant to identify alternative sites for projects because current zoning classifications already deem sites appropriate for particular uses. As with other requirements in the wetland draft rules, IDEM can use its intended statewide zoning control as means to entirely forbid projects. (NCo)

Response: The requirement to complete compensatory mitigation and demonstrate that it is successful only applies to Tier II wetlands. Tier II wetlands are rare wetland types, so the vast majority of applicants will never have to deal with this requirement. The analysis of whether a taking of property has occurred is more complex than what has been implied but requires more than the mere passage of rules that establish the requirements to obtain a certification or permit. As the United States Supreme Court has stated, neither the imposition of a permit requirement nor even the denial of a permit itself necessarily constitutes a taking. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). County zoning boards do not have the same mandate as IDEM to protect water quality, public health, and aquatic life. Consequently, their decisions to adopt zoning classifications are based on different considerations and are not intended to ensure compliance with Indiana's water pollution control laws or rules adopted by the Water Pollution Control Board.

Comment: General permits, mentioned in 327 IAC 17-3-7, should be published with the rules so that the impact of the rules is known. (RSI)

Response: IDEM intends to develop the general permits noted in 327 IAC 17-3-7 and have them available as a part of the package of information presented to the Water Pollution Control Board for final adoption of these draft rules.

Comment: IDEM's authority concerning Corps general permits under 327 IAC 17-3-7 needs to be limited to situations where there would be a violation of standards not just where there would be a significant impact. In 327 IAC 17-3-7(c), there should be no prohibition on use of Corps general permits in the listed types of waters. IDEM should instead impose additional condition in its 401 water quality certification as appropriate. (Gary)

Response: Given the unique characteristics of waters listed under 327 IAC 17-3-7(c), IDEM believes it is appropriate to require an individual, site-specific review of any proposed impact to those waters. A general permit is not the proper means to protect and regulate those few remaining waters that meet the criteria for designation as a ONRW, OSRW, Tier II, exceptional use or salmonid water.

Comment: 327 IAC 17-3-7(f) authorizes IDEM to issue surface water modification general permits; however, the detailed alternatives analysis, public notice, comments, and extended review process proposed for the surface water modification permit will be very expensive and time consuming for both the state and the applicant. Individual surface water modification permits should be reserved for use only on major projects. IDEM is strongly urged to issue general permits that are no less restrictive than the Corps Nationwide Permits and in some instances, such as for degraded Tier I isolated wetlands, a state general permit might be

issued that is less restrictive than the current five-tenth (0.5) acre used for Nationwide Permits. (AEP)

Response: IDEM will develop general permits for the surface water modification permit program that will mirror existing regional general permits and nationwide permits that IDEM has granted water quality certification. It is well established that most of Indiana's wetland are between one-half to three-quarters of an acre in size, and setting limits at this level would only serve to exacerbate wetland losses which in turn would lead to significant degradation of water quality.

Comment: The requirement of 327 IAC 17-4-1 concerning compensatory mitigation wetlands to be of the same type as the impacted wetland should be changed to allow mitigation to include the more rare or high quality wetland types to replace the more common or lower quality type wetlands. (NiS)

Response: Compensatory mitigation must replace the designated and existing uses of a given wetland. The uses are completely dependent on the wetland to be impacted and its unique hydrology, soils, plants, and other organisms. Therefore, a compensatory mitigation wetland must be replaced with the same type; a forested wetland must replace a forested wetland, as an example. This concept is currently used in all existing regulatory programs and does not change any present standard.

Comment: Rather than specifying at 327 IAC 17-4-1(a) that mitigation is required for any project with an impact on more than one-tenth (0.1) acre, mitigation should be required if the Corp of Engineer's regulation require mitigation. (Gary)

Response: Since IDEM is administering regulatory programs under its authority, it is inappropriate to rely on federal programs to fulfill state requirements. The Corps of Engineers' regulatory program does not evaluate a project's potential impacts to state water quality; therefore, any mitigation required by the Corps may not adequately replace adversely impacted waters or existing and designated uses. Further, since the authority of the Corps was constrained in relation to certain isolated waters, certain impacts would not be even be mitigated under the scenario suggested by the commentor.

Comment: The requirement of 327 IAC 17-4-2 that compensatory mitigation must be completed and proven successful before an impact is allowed to a Tier II wetland is illogical, impractical, will not contribute to an improved success rate, and not a reasonable request. It would be considerably more efficient and beneficial to the cost of a project to do the wetland mitigation while proceeding with the wetland impact. Requiring an applicant to wait on the completion of a mitigation site before starting an impact to a wetland will add unnecessary costs to housing development or road projects. It should be enough to require a bond and a detailed mitigation plan. (AEP, Gary, IBA, RSI)

Response: Tier II wetlands are those wetlands that are rare and valuable and immensely difficult, if not impossible, to recreate through mitigation. While IDEM understands that the development community is concerned about costs, the goal of these rules and the Clean Water Act is to incur no reduction in the extent of wetlands that exist in the state. In recognition of the fact that few wetlands remain in Indiana and that those qualifying as Tier II wetlands are a mere fraction of those remaining wetlands, this rule imposes more stringent requirements before impacts to Tier II wetlands may be authorized.

Comment: Criteria should be included in 327 IAC 17-4-3 that IDEM will use to determine whether compensatory mitigation is to be required for non-wetlands. The determination based on significant impact is too subjective. (Gary, RSI)

Response: The criteria IDEM will use to consider what is a significant impact to waters other than wetlands are clearly noted in 327 IAC 17-4-3(c).

Comment: All rule provisions relating to waters other than wetlands should be deleted. Otherwise, the same treatment should be given to wetlands as to other waters. (Gary)

Response: As has been stated previously, wetlands are functionally different than other waters such as lakes and streams. The review procedures developed for projects that affect waters have been written to reflect this difference.

Comment: The requirement of 327 IAC 17-4-5(a) that compensatory mitigation must occur on the same site as the project may have the effect of encouraging developers to buy mitigation credits from a bank or arrange other off-site mitigation that would not require bonding because the majority of developers will not be able or have the desire to bond on-site mitigation for two (2) to five (5) years. As well, the only alternative to completing compensatory mitigation in advance of a project or bonding the success of the mitigation is to utilize a mitigation bank. However, there are very few mitigation banks within Indiana, and IDEM does not have a finalized policy regarding the creation of mitigation banks. (ACI)

Response: All mitigation that occurs outside of a mitigation bank or is not completed up-front and approved by IDEM will require a performance bond, regardless of whether it is onsite or offsite. IDEM will be a signatory to the Interagency Coordinated Agreement on Mitigation Banking by the time these rules are in place, and IDEM is aware that other potential mitigation bankers may be waiting until this happens before approaching the various agencies with a mitigation banking prospectus.

Comment: Locating compensatory mitigation as required by 327 IAC 17-4-5(c) within the same USGS HUC eight (8) digit watershed will not ensure adequate local compensation for the lost uses and functions of a destroyed wetland. The compensatory mitigation should be required to be located within the same eleven (11) digit watershed. (SDCF)

Response: IDEM has worked closely with the EPA, USFWS, IDNR, NRCS, and the Corps of Engineers on mitigation banking, and the consensus is the eight (8) digit restriction is reasonable and protective of the environment.

Comment: Off-site mitigation provisions of 327 IAC 17-4-5 need to be qualified by a practicability test so a mitigation site does not get disqualified for being too distant if there is no closer, acceptable site. (Gary)

Response: IDEM has set forth clear criteria for the location of off-site mitigation. All aspects of 327 IAC 17-4-5 recognize the issue of practicability. IDEM feels the current rule language already addresses this comment.

Comment: 327 IAC 17-4-5(d) should allow flexibility in the mitigation of Tier II wetlands. The siting requirements should be the same as those required for Tier I wetland compensatory mitigation because it will be more difficult to find suitable sites for Tier II mitigation. (NiS)

Response: According to 327 IAC 17-4-5(d), offsite mitigation for a Tier II wetland is required to be located within the same USGS HUC fourteen (14) digit watershed as the project impact because these wetland types are found within very discrete areas of the state. The water quality benefits they provide, including habitat for wetland-dependent, threatened or endangered species, is highly important and cannot be adequately replaced within a large eight (8) digit watershed. The eight (8) digit watersheds span, in some cases, different ecoregions; allowing this area to be utilized for these projects could result in mitigation for wetland types in areas of the state where the wetland type has never existed. Although an eight (8) digit watershed would

provide greater site selection, it would defeat the protections placed by these draft rules on Tier II wetlands that are recognized as being sensitive, high quality wetland areas.

Comment: The requirement of 327 IAC 17-4-6 concerning perpetual protection for a compensatory mitigation site needs to be removed. (Gary)

Response: The current draft rules contain no provision for the perpetual protection of a compensatory mitigation site. 327 IAC 17-4-6 refers to the need for protection of a compensatory mitigation site for at least fifty (50) years.

Comment: The requirement of 327 IAC 17-4-6(a) that compensatory mitigation must be protected for at least fifty (50) years is objectionable. This requirement will prevent a wetland from undergoing its natural, successional evolution and keep it arrested as a wetland. Once compensatory mitigation wetlands are created, they should be allowed to be destroyed if the applicant follows the regulations for mitigation and permitting. (AEP, Gary, IBA)

Response: Deed restrictions and conservation easements place no requirement to maintain a mitigation site as a static entity; wetlands are expected to grow, change, and undergo all natural processes, even if a deed restriction is place on a given area. Wetlands may be much more stable features than once thought. The classical idea of succession developed by Clements in 1916 was the dominant paradigm of succession for the first half of the twentieth century but has been replaced by the continuum model of succession pioneered by Gleason in 1917. Under the classical theory, all systems are moving toward an upland climax. Under the continuum theory, changes occur but not toward any particular climax (Mitsch and Gosslink 1986). Mitsch and Gosslink go further by stating that there appear to be few, if any, examples of wetland ecosystems that become terrestrial without a concurrent allogenic, meaning that which is not caused by living things inhabiting the wetland, lowering of the water level. Niering (1987) concurs stating that, “there is little evidence that wetlands are being replaced by upland forests.” In other words, the classical idea of succession whereby wetlands by their very nature simply fill in and become dry land is outdated and unsupported. It is well established with not only research conducted by IDEM, but numerous other scientific studies that wetlands do not develop into stable ecosystems within the brief period of monitoring. Considerable more time is needed for wetland soils and viable plant communities to form. The deed restriction or conservation easement requirement is intended to allow the mitigation wetland time to develop all characteristics, stabilize, and become a self-sustained ecosystem.

Comment: Impacted wetlands are not required to be protected for fifty (50) years as compensatory mitigation wetlands are under 327 IAC 17-4-6. If a mitigation wetland is successful in meeting its success criteria it should be self-sustaining to the same degree natural wetlands are. The fifty (50) year protection requirement has no precedent. The current requirement of maintenance for three (3) to five (5) years or until successful is reasonable. (Beth, ISEG, RSI)

Response: It is well established with not only research conducted by IDEM but also numerous other scientific studies that wetlands do not develop into stable ecosystems within the brief period of monitoring. Considerable more time is needed for wetland soils and viable plant communities to form. The deed restriction or conservation easement requirement is intended to allow the mitigation wetland time to develop all characteristics, stabilize, and become a self-sustained ecosystem. IDEM has required permanent deed restrictions and/or conservation easements for wetland mitigation sites throughout the implementation of its current regulatory program, as has the Corps of Engineers and the IDNR.

Comment: Long term management should not be a blanket requirement of mitigation plans. Few impacted wetlands have long term management so it seems unfair to require this of applicants. As an alternative to long term management, incentives should be placed on applicants to utilize wetland banks because the wetlands developed there include long term management plans. (NiS)

Response: 327 IAC 17-4-12 lists the factors IDEM will consider in determining the potential for success of a proposed wetland mitigation site. These factors are not requirements. As an example, a proposed plan for the long term management of a proposed compensatory mitigation site as required by 327 IAC 17-4-12 could be the transfer of the wetland mitigation site, upon completion, to an organization dedicated to the conservation of wetlands or its inclusion into a managed area such as a park or nature preserve.

Comment: Unless 327 IAC 17-4-6(a) requires a compensatory mitigation site to be protected in perpetuity and conservation easements or deed restrictions transferred to subsequent holders indefinitely, the intent of wetland rules to obtain no net loss of wetlands is futile since mitigation sites will be subject to future development. (SDC, SDCF, HCR)

Response: The deed restriction or conservation easement requirement is intended to allow the mitigation wetland time to develop all characteristics, stabilize, and become a self-sustained ecosystem. The draft rules are not intended and should not be construed as a "wetland protection act"; IDEM regulates impacts to wetlands through these rules, not the conservation of wetlands. The federal and state policy of "no net loss" refers to the evaluation of all actions through this process to insure that if impacts to wetlands are permitted mitigation is provided and that overall a balance of wetland acreage and uses is maintained.

Comment: The requirement of 327 IAC 17-4-6(b) that a deed restriction or conservation easement be submitted to IDEM within one (1) year of the issuance of the water quality certification or surface water modification permit is not practical because at that time it may not be known if the compensatory mitigation site is going to be successful and the amount of corrective action that could take place on the site may be limited if the site is not meeting the success criteria. A deed restriction or conservation easement should be in place before a compensatory mitigation site is completed but should not be required within the first year. (ACI)

Response: The draft rules have been revised with the following language at 327 IAC 17-4-6(b): "A properly recorded conservation easement or deed restriction required by subsection (a) must be submitted by the applicant to the department within sixty (60) days of receipt of the department's written release from all compensatory mitigation monitoring requirements.".

Comment: The 1:1 compensatory mitigation ration required by 327 IAC 17-4-7(a) for Tier II wetlands is inadequate despite the requirement for mitigation to be proven successful and completed before impacts may occur. A protocol cannot be developed and effectively implemented to truly reflect whether a Tier II wetland has been wholly replaced and is fully functional. Attempts to recreate a Tier II wetland in a decade or less are likely trivial in comparison to the natural development time of over thousands of years for these rare wetlands. Given the overall poor success rate of mitigation for Tier I wetlands, an extra cushion added to the 1:1 compensatory mitigation ratio for Tier II wetlands is essential to adjust for the inevitable unforeseen failures in mitigating Tier II wetlands. (SDCF)

Response: The ratio of 1:1 for Tier II wetlands is set at this level because mitigation must be up-front and proven successful before impacts to the Tier II wetlands may occur. The purpose of ratios is to compensate for the temporal lag between the destruction of the impact site and the success of the mitigation site and to offset inevitable mitigation failures. There is no time lag or

risk of failure if the mitigation is done up-front and proven successful so there is no need for an increased ratio. If the mitigation site can not achieve the same quality of the original wetland it will not be considered successful, and IDEM will not authorize the impact to occur. Further, numerous scientific protocols exist that can be used to accurately and effectively assess wetland functions and wetland health.

Comment: More common sense should be applied to the mitigation ratios contained in 327 IAC 17-4-7(a). To say that any forested wetland is worth twice as much as any emergent wetland just because it has trees, especially given that the trees may be willows or cottonwoods that have grown up in a wet spot in a farm field, is unjustifiable. (NiS)

Response: The need for ratios, especially higher ratios for forested communities, is well justified and well documented. IDEM's own analysis of ten (10) years of mitigation sites in Indiana reveals the specific need for ratios. Mapping of each vegetation community at these sites revealed that forested areas, which had a failure rate of seventy-one percent (71%), and wet meadow areas, with an eighty-seven percent (87%) failure, were harder to establish than shallow emergent areas, having seventeen percent (17%) failure, and open water areas, having four percent (4%) failure. Compensation for this risk of failure would require minimum mitigation ratios of 3.4:1 for forested, 7.6:1 for wet meadow, 1.2:1 for shallow emergent, and 1:1 for open water. Additional mitigation may be needed to offset the effects of temporal loss of wetland function. Although there was a net gain in area over all, forested wetlands experienced a net loss of four and fifteen one-hundredths (4.15) hectares, or ten and three-tenths (10.3) acres, raising concerns that forested areas are being replaced with shallow emergent and open water community types.

Comment: The mitigation ratios contained in 327 IAC 17-4-7(a) based on vegetation types are problematic since it is legal for a property owner to cut vegetation thus changing the wetland type such as from forested wetland to emergent marsh by cutting down the trees. Will the mitigation ratio be determined by the present wetland type or what previously was there? Most Indiana wetlands were once forested. How far back in time will IDEM consider to judge the wetland type? A more defensible approach would be to use the same mitigation ratio, a 2:1 ratio, for all Tier I wetlands (AEP)

Response: The current draft rules clearly address the issue of vegetation clearing. The definition at 327 IAC 17-1-4(24) of a "Forested wetland" is: "a wetland dominated by woody vegetation that has a diameter, at breast height, greater than three (3) inches, regardless of total height. Wetlands that have been cleared of woody vegetation within five (5) years previous to the project will be considered forested wetlands by the department.".

Comment: The lowering of a mitigation ratio under 327 IAC 17-4-7(b) is a good provision in the draft wetland rules; however, the ratios should be reduced to as little as 1:1 if the applicant can supply an appropriate demonstration of reduced function in the wetland to be impacted. (NiS)

Response: The draft rule language of 327 IAC 17–4-7(b) is appropriate. Any further reductions in ratios would violate IDEM's goal to meet the national policy of no net loss of wetlands and would potentially result in adverse impacts to water quality.

Comment: The lowering of mitigation ratios as allowed by 327 IAC 17-4-7(b) should also include an allowance to lower a ratio by one (1.0) acre for providing a protected upland buffer. An upland buffer around a mitigation site is very important because it can protect water quality by filtering nutrients or silt from the water column, mitigate temperature extremes, and provide wildlife habitat by supplying feeding and nesting areas and a corridor to allow wildlife to

move from one wetland or upland habitat to another. As an example, mitigation for a four (4) forested wetland would include one (1) acre of buffer and three (3) acres of forested wetland. (AEP)

Response: While upland buffers around wetland mitigation sites provide many benefits, IDEM may require buffer areas around mitigation sites only if they will reduce the risk of failure or are otherwise necessary to replace the functions lost. Direct use of uplands to meet mitigation requirements, however, will not be allowed. This is consistent with federal guidance on mitigation.

Comment: The requirement of 327 IAC 17-4-8(a)(2) that be posted prior to issuance of the water quality certification or surface water modification permit is not practicable for many applicants especially private individuals or small developers. (ACI)

Response: This section of the rules details two other options for applicants who are unable to provide a performance bond or irrevocable letter of credit to guarantee the completion of required mitigation. An applicant may construct required mitigation up-front and prior to the commencement of activities that would impact wetlands or, subject to approval of IDEM, purchase credits at an approved mitigation bank. These options provide a high degree of flexibility for all applicants.

Comment: If a performance bond or irrevocable letter of credit is sufficient to guarantee mitigation in some cases, then it should be applicable to all cases including Tier II wetland mitigation. (Gary)

Response: It is unnecessary to guarantee up-front mitigation with a performance bond or letter of credit because the mitigation must be complete and successful before impacts are allowed. This obviates the need to require financial assurances that the mitigation will be completed. Some wetlands, given the difficulty in reproducing the ecosystem or the important water quality they provide, must be replaced in advance of impacts in order to have complete protection of these important wetland types. Furthermore, bonds will not guarantee that Tier II wetlands may be or can be successfully replaced.

Comment: The narrative description of planned hydrology required in a compensatory mitigation plan under 327 IAC 17-4-11(b)(8)(A) is seldom necessary concerning agricultural mitigation projects because most of the restorations completed by NRCS are based on the removal of subsurface and other man made systems that allows natural hydrology to reassert itself. The expectation of hydrology in these projects would be based on soil survey data and other knowledge of soil characteristics, and it is unclear in the draft rule whether this reasoning would be acceptable. (NRCS)

Response: Empirical observations reveal that removal of tile or other man made drainage structures often results in jurisdictional wetlands smaller than the size required. Pre-project data is necessary to refine these predictions and will be required for all sites, including those involving drainage removal.

Comment: All the information required by 327 IAC 17-4-11(b)(9) concerning a compensatory mitigation plan is excessive for the type projects done by the NRCS where breaking and sealing existing tile and allowing the water table to return to its natural condition is all that is needed for many wetland restorations. Detailed surveys and tying surveys to the National Geodetic Vertical Datum are burdensome and unnecessary requirements. (NRCS)

Response: Numerous studies over the last twenty (20) years have documented inadequacies in compensatory mitigation. These studies point to the inadequacy of pre-project data. See “Compensating for Wetland Losses under the Clean Water Act” (National Research

Council 2001) for an excellent synopsis of this literature. Pre-project data in order to reduce the risk of failure will be required from all applicants

Comment: It is recommended that alternative analysis only be required under 327 IAC 17-3-4 for impacts to ONRWs because it is an unreasonable burden on applicants to require an alternatives analysis for every nonwater dependent project especially for short term projects that are covered under the nationwide permitting process. (NiS)

Response: This requirement does not apply to any project that either qualifies for a Corps of Engineers general permit that IDEM has granted water quality certification or a general permit established as a part of the surface water modification permit program. These "short-term" projects and projects with minor impacts have been clearly spelled out in the terms and conditions of the general permits. All other projects are considered to have significant impacts on water quality and it is reasonable for IDEM to have all alternatives evaluated to determine if a project could be modified to reduce impacts. This same analysis is required by the Corps of Engineers.

Comment: A reasonable time limit for a final decision and approvals must be established under 327 IAC 17-4-12. (RSI)

Response: All decisions and approvals regarding all aspects of mitigation, including the review of proposed mitigation plans, will occur during the application review periods specified in the draft rules.

Comment: There will be difficulty assessing the presence of exotic plant species on or adjacent to a proposed compensatory mitigation site as 327 IAC 17-4-12(2)(D) states is to be part of the review criteria to determine the probability of success of a site. The landowner of the adjacent property may not agree to have the property searched for invasive plant species. (NRCS)

Response: The language of the rule does not require a detailed investigation of the conditions on properties adjacent to a mitigation site. This section of the rule lists criteria IDEM will consider when evaluating whether a potential mitigation plan will result in the successful replacement of a wetland area.

Comment: Under 327 IAC 17-4-13(b)(1), a compensatory mitigation site that has been proven successful in the first two (2) years should only be required to do two (2) years of mitigation monitoring rather than the three (3) required in the draft rule. (ACI)

Response: Three (3) data points are required, at a minimum, to evaluate a trend. The suggested revision would not allow an accurate determination of success by IDEM.

Comment: Many specific factors to be monitored in a compensatory wetland mitigation monitoring plan are listed in 327 IAC 17-4-13(e)(6) as if they may be required to be monitored. Previous experience with IDEM has been that things that may be required have tended to become requirements. Criteria should be established to state when extra monitoring is necessary. (NRCS)

Response: The list of factors to be monitored for a given wetland mitigation site will vary based on the type of wetland to be impacted. All factors to be monitored will be enumerated in the final approved mitigation plan, developed by the applicant with requirements from IDEM.

Comment: "Wetland monitoring report" as used throughout 327 IAC 17-4-14 should be expanded to read "wetland compensatory mitigation monitoring report" for clarification. (SDCF)

Response: The draft rules have been revised to reflect the suggested language.

Comment: The success criteria of 327 IAC 17-4-15 and the remediation plan required under 327 IAC 17-4-16 for compensatory mitigation sites are useful components of the wetland

rules, but long term management for these created wetland sites is needed if they are supposed to replace natural area wetlands. Without long term management, it won't be long before what little native plant diversity exists at these sites will be lost and they will become much less useful for wildlife. (SO)

Response: Wetland mitigation sites often benefit from long term management such as control of exotic vegetation. This is a factor that is considered when IDEM evaluates a proposed mitigation plan (see 327 IAC 17-4-12).

Comment: Among the success criteria contained in 327 IAC 17-4-15(2), it will be impractical if not impossible to guarantee that a compensatory mitigation site is free of purple loosestrife and Phragmites because they are just too common and persistent. Water milfoil is perhaps even more difficult to control since it grows in standing water and can spread from small fragments. Water milfoil should be removed from 327 IAC 17-4-15(2) and put in subdivision (3) with reed canary grass and cattails. If the criteria concerning loosestrife, Phragmites, and water milfoil are retained in the draft rule, then they should also apply to the designation of Tier II wetlands. Perhaps the rule could allow for practical technology to control these species while still granting approval for the mitigation site. (AEP, Gary, ISEG, NCo, NiS, NRCS, RSI)

Response: These invasive plants are particularly problematic in immature wetland compensatory mitigation sites because the natural vegetation has not yet established. Due to the fierce competitiveness and spread of these plants, the presence of any purple loosestrife or phragmites during the monitoring period is a strong indication that this site will not achieve success. They must be eliminated from the mitigation site or there must be a program to control the infestation in the long-term. The removal of these controls would result in the replacement of wetlands that were free from or had minor infestation with wetlands that are dominated by exotic invasive species. The mere presence of these plants in a wetland does not change its importance or biological significance.

Comment: Reed canary grass and cattails are limited under 327 IAC 17-4-15(3) to less than fifteen percent (15%). This is often impractical as the conversion site may contain these species making the rule requirement unfair. (NRCS)

Response: An infestation of reed canary grass at the "conversion" site does not make control of the invasive at the impact site "impractical." Many options are available for the control of the listed species. Additionally, if the site in question contains these species, it may in fact be a wetland, or may be unsuitable for conversion if the site is completely dominated by these species.

Comment: The success criteria for compensatory mitigation do not stipulate a time indicator for successful completion of a mitigation project. A variety of factors which could differ on a site by site basis will determine success and completion; however, timing for any economic development project is of paramount importance. (Gary)

Response: 327 IAC 17-4-4 requires compensatory mitigation to be completed within one (1) year of the issuance date of the water quality certification or surface water modification permit unless a written extension is granted by IDEM. Successful completion of mitigation is entirely contingent on the ability of the mitigation site and the applicant to achieve the success criteria.

Comment: It is of concern that 327 IAC 17-4-18(1) would allow existing uses to be lost. Pursuant to the Clean Water Act, existing uses cannot be suspended. (SDC)

Response: IDEM does not believe that this section of the rule would allow for the loss of existing uses. The language states: "The existing and designated uses lost by impacting waters other than wetlands will be adequately replaced by the compensatory mitigation.".

Comment: The new wetland rules designate all wetlands for full body contact, recreation, wildlife, and other uses and the rehabilitation to such designated uses regardless if the uses currently exist. This is in direct violation with IC 13-14-8-4. The wetland rules should take into account the actual local conditions regarding varying circumstances and different contaminant sources according to IC 13-14-8-3. A blanket statewide presumption about wetland uses is neither authorized nor required by state law. (NCo)

Response: IDEM believes that a statewide presumption about wetland uses is authorized by state law. Such a presumption is already part of the water rules adopted by the WPCB. For example, 327 IAC 2-1-3(a) currently provides that "[s]urface waters of the state are designated for full-body contact recreation...." IDEM believes that a statewide standard regarding wetland uses is warranted. The draft rule, at 327 IAC 2-1.8-3(1), does allow wetland habitat designated uses to be specific to each particular wetland type. This meets the requirement of IC 13-14-8-4, which requires the WPCB to take into account "all existing physical conditions and the character of the area affected" (i.e., the wetland itself). IDEM will also take "varying circumstances and different contaminant sources" into account for specific wetlands when an application for a permit is received.

Comment: Though the requirement of 327 IAC 17-4-22(1)(B) seems reasonable, it could prevent the rehabilitation of degraded streams or ditches. In stream restoration projects, the goal is not to maintain existing grade, hydraulics, and basic channel geometry but to improve conditions that may require modifying some or all of those characteristics. (NiS)

Response: The clause (B) language of this part of the draft rules reads as follows: "be comparable to the grade, hydraulic capacity, and basic channel geometry of the channel **as specified in the water quality certification or surface water modification permit.**".(Emphasis added) This language was drafted to address the cases where IDEM permits channel alterations for the purpose of stream restoration. The certification or permit may be conditioned by IDEM to reflect these positive changes to grade, hydraulic capacity, and basic channel geometry which would be alterations of existing conditions. The rule does not constrain projects to maintenance of existing site characteristics especially if improvements to water quality would be realized by the successful completion of the project. IDEM feels the current draft rule language adequately addresses this concern.

Comment: The only reason under 327 IAC 17-5-1(a)(4)(A) through (E) that IDEM should be allowed to deny a water quality certification is if an applicant does not submit a complete application or does not meet some other requirement of the wetland rules, but any requirement relating to significant degradation or impacts to uses should not be cause to deny a certification. The rule needs to clarify that IDEM "shall" rather than "may" grant a certification where these requirements are met. (Gary)

Response: IDEM believes that antidegradation requirements should be a factor in granting a water quality certification or SWMP. Antidegradation is a crucial part of the protection of water quality in the state, and eliminating it from the rule would violate the intent of the CWA, and be contrary to Indiana's own antidegradation policy.

Comment: It is strongly recommended that IDEM reconsider 327 IAC 17-5-1(a)(5) and its provision that a water quality certification or surface water modification permit shall be waived if IDEM fails to make a final determination within one (1) year of receipt of a complete

application. The state should not automatically relinquish its authority and thereby allow degradation of wetlands. Delaying factors would be more likely to affect applications with great potential to significantly degrade wetlands rather than those that can demonstrate otherwise. It is known that the one (1) year provision is attributed to Section 401 of the Clean Water Act, and if IDEM does not have the authority to alter this provision for water quality certifications then, at least, do so for the surface water modification permits. (SDCF)

Response: IDEM completes all reviews within the specified timeframes and applicants who might seek to delay the process in the hopes of "using up" the review period would receive denials, rather than waivers. The draft rules make clear the responsibility the applicant has to provide information in a timely manner or risk a possible denial. For consistency between the two regulatory programs, IDEM will keep the provision in place and the same for each.

Comment: The time frame for review of a 401 water quality certification application should be no more than one hundred twenty (120) days which is a reasonable amount of time for even the most complicated project. (NiS)

Response: The federal Clean Water Act specifically states under Section 401 that a water quality certification is deemed waived only after the state has failed to act on such a request within one (1) year. IDEM must follow the federal language.

Comment: There appears to be a conflict in 327 IAC 17-5-3(a) that states a water quality certification or a surface water modification permit expires in two (2) years if work is not commenced; yet, impacting a Tier II wetland requires advance completion of compensatory mitigation which may take three (3) to five (5) years to prove successful. (NiS)

Response: IDEM has modified 327 IAC 17-5-3 by adding language that states for certifications or permits issued for impacts to Tier II wetlands, the certification expires two (2) years after the date the required mitigation is proven successful and complete.

Comment: 327 IAC 17-7-3(b)(2) should not allow for the issuance of an after the fact permit or certification at no cost to the violator. Where a penalty may not be appropriate, the rule could be written to allow for penalty waiver for such instances. However, those who disobey the rules should not be allowed to receive a certification or permit without a penalty for the violation. Furthermore, penalizing those who violate the wetland rules should be a much needed source of income to support adequate enforcement of the wetland protection program of the state. Section 401 of the Clean Water Act calls for a fee of twenty-five thousand (25,000) dollars per day per violation. (SDCF)

Response: IDEM has clearly denoted that persons who violate the provisions of these rules will be penalized. The language in 327 IAC 17-7-4 concerning enforcement details the possible actions IDEM can take in the event of a violation. This would include fines, increased mitigation ratios, restoration of impacts, and denial of authorization. All options carry clear costs to a potential violator and provide the flexibility suggested by the commentor.

Comment: Once the wetland rules become effective, is it possible to establish a 401 certification or surface water modification permit fee without going to the General Assembly? Having a wetlands application fee will provide IDEM with the necessary resources to do a good job in a more timely fashion. (HCR)

Response: Permit fees of any type must be established by the Indiana General Assembly unless the General Assembly authorizes the setting of fees in rules. At this time, IDEM does not intend to establish permit fees for either the 401 water quality certification or surface water modification permit program.